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THE

MOST MATERIAL PARTS

OF

KENT'S COMMENTARIES,

REDUCED TO

QUESTIONS AND ANSWERS.

BY

JOHN C. DEVEREUX,

COUNSELLOR AT LAW

NEW EDITION.

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PREFACE.

THIS is the second of a series of five or more works, upon the same plan, intended for the use of students of the law chiefly, which it is the purpose of the writer to complete without unnecessary delay.

The first of the series, entitled "The Most Material Parts of Blackstone's Commentaries reduced to Questions and Answers," appeared last year. There is already ample reason to believe that it has proved serviceable, and has supplied a want of the profession.

Blackstone's great work must ever continue a *vade mecum*, indispensable to all students and practitioners of the common law, yet a large portion of the learning in the Commentaries on the Laws of England has become, in this country, obsolete or inapplicable. Indeed, if we compare the works of Blackstone and Kent, in their relation respectively to the existing state of the law with us, the superiority of the American commentaries is manifest. The works differ widely, not only in their plan, but in their mode of treating the various topics embraced in them. The first three volumes of Kent are devoted to subjects which, although mostly included in the plan of the English commentator, he has treated superficially or failed altogether to consider. The principles and rules of law set forth in the American commentaries are living truths here, of daily and constant application.

A distinguished American jurist, recently deceased,*

* Chief Justice Duer.

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says, speaking of Kent's Commentaries, "They contain all the learning of real and permanent importance that is to be found in the Commentaries of Blackstone, if we except that portion of his work which relates to the English constitution and government, and they supply deficiencies that all the readers of Blackstone admit and regret. They are, indeed, exactly the work that the condition of our country and of the law, and the daily wants of its students and professors, had long demanded; nor would it be easy to define the extent, or limit the duration of the benefits that have flowed, and must continue to flow, from its general reception, use and authority."

This attempt to render the crowning work of Chancellor Kent's useful and distinguished career, into a form calculated to facilitate the acquisition of its valuable contents, is submitted with diffidence, but in the confident hope that it will command a place among works useful to the profession.

It was undertaken and prosecuted, the writer is happy to say, with the knowledge and approval of the Hon. William Kent. He, also, takes pleasure in stating that T. M. Lalor, Esq., author of "The Law of Real Property of the State of New York," published in 1855, has rendered the most valuable assistance in preparing this work.

J. C. D.

New York, *October*, 1859.

Note.—The ninth and last edition of Kent's Commentaries was used in the preparation of this volume.

The numbers in the text, at the end of the questions respectively, refer to marginal paging of the Commentaries, etc.

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KENT'S COMMENTARIES

REDUCED TO

QUESTIONS AND ANSWERS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

1. *When the United States assumed the character of an independent nation, to what system of public law did they submit themselves?*—1

They became subject to that system of rules which reason, morality, and custom, had established among the civilized nations of Europe, as their public law. They claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law," according to the general usages of Europe."*

2. *What are we to understand by the law of nations?*—1.

That code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other.

3. *Upon what, according to Montesquieu, is the law of nations founded?*—1.

It is founded on the principle, that different nations ought

* See Journals of Congress, Vol. vii. 185. The English judges have frequently declared that the law of nations was part of the Common Law of England; and it is well settled that the Common Law, so far as it may be consistent with the Constitutions of this country, and remains unaltered by statute, is an essential part of American jurisprudence.

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to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interests.

4. *How have writers differed concerning the foundation of the law of nations?*—2.

It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature,* applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws.

5. *What is the most useful and practical part of the law of nations?*—2.

Instituted or positive law, founded on usage, consent, or agreement.

6. *Is it proper to separate this instituted or positive law of nations from natural jurisprudence?*—2.

It would be improper to separate that law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity, from the same principles of right reason, the same views of the constitution and nature of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced.

7. *Is there then a natural, as well as a positive law of nations?*—2.

There is.

8. *How far are states, in their relations with other states, bound by this natural law of nations?*—2.

By it, every state, in its relations with other states, is bound to conduct itself with justice, good faith and benevolence.

9. *How is this application of the law of nature called?*—2.

By Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; by others, the internal law of nations, because it is obligatory upon them in point of conscience.

* The law of nature, by the obligation of which individuals and states are bound, is identical with the will of God, and that will is ascertained, either by consulting Divine revelation, where that is declaratory, or by the application of human reason, where revelation is silent.

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10. *Should we separate the science of public law and that of ethics?*—3.

We ought not to separate the science of public law from that of ethics, nor encourage the dangerous suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns.

11. *How are states, or bodies politic, to be considered?*—3.

As moral persons having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of which carries with him, into the service of the community, the same binding law of morality and religion which ought to control his conduct in private life.

12. *Of what does the law of nations consist?*—3.

It is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce; and of a code of conventional or positive law.

13. *In the absence of conventional or positive law, how are the intercourse and conduct of nations to be governed?*—3.

By principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligations.

14. *Have the Christian nations a law of nations peculiar to themselves?*—3, 4.

The Christian nations of Europe, and their descendants on this side of the Atlantic, have established a law of nations peculiar to themselves. It is the offspring of modern times.

15. *Had the ancients an international law?*—4.

The most refined states, among the ancients, seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons

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and property as lawful prize. Their laws of war and peace were barbarous and deplorable. In the most enlightened ages of the Grecian republics, piracy was regarded as an honorable employment. There were states that avowed its practice.

16. *What was the received opinion among the Grecians, as to the reciprocal rights and duties of their own cities and states?*—4.

That they were bound to no duties, nor by any moral law, without compact; and that prisoners taken in war had no rights, and might lawfully be put to death, or sold into perpetual slavery with their wives and children.

17. *Were the early Romans under the influence of international law?*—5.

They exhibited much stronger proofs than the Greeks of the influence of regular law, and there was a marked difference between those nations in their intercourse with foreign powers. It was a principle of the Roman government, that none but a sworn soldier could lawfully fight the enemy; and in many instances the Romans showed that they excelled the Grecians, by the observance of better principles in their relations with other nations. The institution of the college of heralds, and the fecial law, were proofs of a people considerably advanced in the cultivation of the law of nations as a science.

18. *When was the law of nations recognized by the Romans?*—7.

In the latter age of the Roman empire, when their municipal law became highly cultivated, and adorned by philosophy and science, the law of nations was recognized by them as part of the natural reason of mankind.

19. *What was the Roman jurisprudence, in its most cultivated state, on the subject of national duty?*—8.

It was a very imperfect transcript of the precepts of natural justice. It retained strong traces of ancient rudeness, from the want of the Christian system of morals, and the civilizing restraints of commerce.

20. *Upon the fall of the Roman empire, what was the state of international law?*—8.

The irruption of the northern tribes of Scythia and Ger-

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many, overturned all that was gained by the Roman law, annihilated every restraint, and all sense of national obligation; and civil society relapsed into the violence and confusion of the barbarous ages. Piracy, rapine and ferocious warfare deformed the annals of Europe. The manners of nations were barbarous, and their maxims of war cruel. Notwithstanding some efforts to introduce order and justice, and though municipal law had undergone great improvement, the law of nations remained in a rude and uncultivated state down to the period of the sixteenth century.

21. *Did the Emperor Charlemagne improve the public law of Europe?*—9.

He made distinguished efforts to improve the condition of Europe, by the introduction of order, and the propagation of Christianity; and we have examples, during the darkness of the middle ages, of some recognition of public law by means of alliances, and the submission of disputes to the arbitrament of a neutral power.

22. *What institutions, about the period of the eleventh century, contributed, in a very essential degree, to improve the law of nations?*—9.

Five are enumerated: 1. The feudal system. 2. The concurrence of Europe in one form of religious worship and government. 3. The establishment of chivalry. 4. The negotiations and treaties forming the conventional law of Europe. 5. The settlement of a scale of political rank and precedency. Of all causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community.

23. *What was the influence of Christianity in improving public law?*—10.

It was very efficient toward the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The church had its councils or convocations of the clergy, which formed the nations professing Christianity into a connection resembling a federal alliance; and those councils sometimes set-

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tled the titles and claims of princes, and regulated the temporal affairs of the Christian powers. The confederacy of the Christian nations was bound together by a sense of common duty and interest, in respect to the rest of mankind.

24. *What influence had chivalry upon the laws of war?*—11.

It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonorable. It dictated humane treatment to the vanquished, courtesy to enemies, and the virtues of fidelity, honor, and magnanimity in every species of warfare.

25. *What influence had the civil law in improving the law of nations?*—11.

The introduction and study of the civil law, contributed largely to more correct and liberal views of the rights and duties of nations. This grand monument of the embodied wisdom of the ancients, when once known and examined, must have reflected a broad stream of light upon the feudal institutions, and the public councils of the European nations. We accordingly find that the rules of the civil law were applied to the government of national rights, and they have contributed very materially to the erection of the modern international laws of Europe. From the thirteenth to the sixteenth century, all controversies between nations were adjudged by the rules of the civil law.

26. *What influence had treaties, conventions, and commercial associations, in forming the modern code of public law?*—12.

They gave a new character to the law of nations, and rendered it more and more of a positive or instituted code.

27. *How did commercial ordinances and conventions contribute to that end?*—12.

They improved and refined public law and the intercourse of nations, by protecting the persons and property of merchants in cases of shipwreck, and against piracy, and against seizure and arrest upon the breaking out of war.

28. *When commenced the practice of plundering shipwrecks?*—13.

It has been traced to the Rhodians, and from them it passed to the Romans.

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29. *What of the efforts to restrain it?*—13.

They were very feeble and gradual, and mixed with much positive injustice. The goods cast ashore first belonged to the fortunate occupant, and then they were considered as belonging to the state.

30. *What effect had this change from private to public appropriation of shipwrecked property?*—13.

It rendered a returning sense of right and duty more natural and easy.

31. *What Roman emperors first renounced their claim to shipwrecked property, in favor of the owners?*—13.

Hadrian and Antoninus.

32. *Were Roman laws in favor of the sufferers by shipwreck, subsequently disregarded?*—13.

They were disregarded by succeeding emperors; and, when the empire was overturned, these laws of humanity were swept away in the tempest.

33. *What effect had the continual depredations at sea of the Saxons and Normans?*—13.

They induced the inhabitants of the western coasts of Europe to treat all navigators, who were thrown by the perils of the sea upon their shores, as pirates, and to punish them as such, without inquiry or discrimination.

34. *What contributed gradually to suppress this criminal practice?*—13.

The revival of commerce, and with it a sense of the value of order; commercial ordinances; particular conventions and treaties between sovereigns, by rendering the regulations upon the subject of shipwrecks a branch of the public law of nations.

35. *What put the finishing stroke to the practice?*—14.

The ordinances of Louis XIV., by declaring that shipwrecked persons and property were placed under the special protection and safeguard of the crown; and by which the punishment of death, without hope of pardon, was pronounced against the guilty.

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36. *To what is to be imputed the progress of humanity in the treatment of prisoners?*—14.

To the influence of Christianity, and of conventional law, establishing a general exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose.

37. *What resulted from the admission of resident ambassadors?*—15.

It was an important improvement in the security and facility of national intercourse; and led to the settlement of a great question, which was very frequently discussed in the fifteenth and sixteenth centuries, concerning the inviolability of ambassadors. It became at last a definitive principle of public law, that ambassadors were exempted from all local jurisdiction, civil and criminal.

38. *How stood the law of nations at the age of Grotius?*—15.

It had been rescued, to a very considerable extent, from the cruel usages and practices of the Barbarians. It had been restored to some degree of science and civility by the influence of Christianity, the study of the Roman law, and the spirit of commerce. It had grown in value and efficacy, from the intimate connection and constant intercourse of the modern nations of Europe, who were derived from a common origin, and were governed by similar institutions, manners, laws and religion. But that law was still in a state of extreme disorder, and its principles were little known and less observed.

39. *How is Grotius considered?*—15.

As the father of the law of nations, and justly.

40. *What was his object?*—16.

To correct false theories and pernicious maxims, by showing a community of sentiment among the wise and learned of all ages and nations, in favor of the natural law of morality. He likewise undertook to show that justice was of perpetual obligation, and essential to the well being of every society, and that the great commonwealth of nations stood in need of law, and the observance of faith, and the practice of justice. His object was to digest, in one systematic code, the principles of public right,

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and to supply authorities for almost every case in the conduct of nations.

41. *What did he accomplish ?*—16.

He reduced the law of nations to a system, and produced a work which has been resorted to as the standard of authority in every succeeding age.

42. *Who holds the first rank among the disciples of Grotius ?*—17.

Puffendorf. His work went more at large into the principles of natural law, and combined the science of ethics with what may be more strictly called the law of nations. It is rather a treatise on moral philosophy than on international law ; and is of very little practical value in teaching us what the law of nations is at this day.

43. *What of the works of Wolfius, Burlemaqui, and Rutherforth ?*—17.

They are rather treatises on moral philosophy than on international law.

44. *What of the work of Marteus ?*—17.

His summary of the law of nations is a treatise of great practical utility, but it is only a very partial view of the system, being confined to the customary and conventional law of the modern nations of Europe.

45. *What of Bynkershoeck's treatise on the laws of war ?*—17.

It has been received as of great authority on that particular branch of the science of the law of nations, and the subject is by him ably and copiously discussed.

46. *What of Vattel ?*—18.

The most popular, and the most elegant writer on the law of nations is Vattel, whose method has been greatly admired. He has been cited, for the last half century, more freely than any one of the public jurists.

47. *Has the code of war improved since the age of Grotius ?*—18.

It has been vastly enlarged and improved, and its rights better defined, and its severities greatly mitigated. The rights

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of maritime capture, the principles of the law of prize, and the duties and privileges of neutrals, have grown into very important titles in the system of national law.

48. *What evidence of the rules of public law do we possess?*—18.

We now appeal to the decisions of those tribunals, to whom, in every country, the administration of that branch of jurisprudence is specially intrusted; and, also, to the official documents and ordinances of particular states, which have professed to reduce into a systematic code, for the direction of their own tribunals, and for the information of foreign powers, the law of nations, on those points which relate particularly to the rights of commerce and the duties of neutrality. In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims.

49. *How are the United States guided in their foreign negotiations, and domestic discussions of questions of international law?*—19.

We pay the most implicit respect to the practice of Europe, and the opinions of her most distinguished civilians.

50. *What are referred to, as containing the most authentic evidence of the immemorial, and customary law of Europe?*—19.

The most celebrated collections and codes of maritime law, such as the *Consolato del Mare*, the laws of Oleron, the laws of the Hanseatic League, and, above all, the maritime ordinances of Louis XIV.

51. *To whom is a knowledge of international law necessary?*—20.

A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practicing in our commercial ports, but to every gentleman who is animated by liberal views, and a generous ambition to assume stations of high public trust.

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LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

1. *Are nations equal to, and independent of each other, in a state of peace?*—21.

They are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law.

2. *What is a necessary consequence of this equality among nations?*—21.

It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. No state is entitled to take cognizance, or notice of the domestic administration of another state, or of what passes within, as between the government and its own subjects.

3. *When may circumstances justify an interference with the internal concerns of other states?*—23.

Every nation has an undoubted right to provide for its own safety, and to take precaution against distant as well as impending danger. The danger, however, must be great, distinct, and imminent, and not rest on vague and uncertain suspicion. The British government officially declared to the allied powers, in 1821, that no government was more prepared than their own "to uphold the right of any state or states to interfere, where their own security, or essential interests were seriously endangered by the internal transactions of another state;—that the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby;—that it could not receive a general and indiscriminate application to all revolu-

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tionary movements, without reference to their immediate bearing upon some particular state or states;—that its exercise was an exception to general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case; and exceptions of this description could never, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations." The limitation to the rights of interference with the internal concerns of other states, was defined, in this instance, with uncommon precision.

4. *Why is it that no form of civil government, which a nation may think proper to prescribe for itself, can be admitted to create a case of necessity justifying an interference by force?*—24.

Because a nation, under any form of civil policy which it may choose to adopt, is competent to preserve its faith, and to maintain the relations of peace and amity with other powers.

5. *When may assistance be afforded by one nation to the subjects of another nation, consistently with the law of nations?*—24.

In extreme cases, it is said, as when rulers have violated the principles of the social compact, and given just cause to their subjects to consider themselves discharged from their allegiance. The right of interposition must depend upon the special circumstances of the case. It is not susceptible of precise limitations, and is extremely delicate in the application.

6. *What are the most unexceptionable precedents, as to the right of interference?*—24.

Those in which the interference did not take place until the new states had actually been established, and sufficient means and spirit had been displayed to excite a confidence in their stability.

7. *Are treaties affected, or positive obligations of any kind with other powers or with creditors, weakened by mutations in governments, or revolutions?*—25.

It is well understood, that treaties or positive obligations of any kind are not weakened by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government.

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8. *What if a state be divided in respect to territory?*—25.

Its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.

9. *What extent of jurisdiction over adjoining seas, may a nation exercise?*—26.

It is often a difficult question, and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory, and the sea-coast adjoining it, and navigable waters included in bays, and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation, and to the undisturbed use of the neighboring shores.

10. *Is the open sea capable of being possessed as private property?*—26.

It is not. The free use of the ocean, for navigation and fishing, is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated.

11. *Have nations any territorial jurisdiction at sea?*—26.

No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered, or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs.

12. *In what state is the claim of dominion to close or narrow seas?*—28, 29.

It is still the theme of discussion and controversy. All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end. A more extended dominion must rest entirely upon force and maritime supremacy

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r into the sea does the general territorial jurisdiction

According to the current of modern authority, it extends into the sea as far as cannon shot will reach, and no farther, and this is generally calculated to be a marine league.

14. *How have Congress recognized this limitation?*—29.

By authorizing the District Courts to take cognizance of all captures made within a marine league of the American shores.

15. *To what distance around our territory should the neutral immunity extend?*—30.

It ought, at least, to be insisted that no belligerent rights should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another."

16. *Have maritime states a right of visitation and inquiry, within those parts of the ocean adjoining to their shores?*—31.

It was so judicially declared in England; and the exercise of jurisdiction to that distance, for the safety and protection of the revenue laws, was declared, by the Supreme Court, to be conformable to the laws and usages of nations.

17. *Why should nations cultivate a free intercourse for commercial purposes?*—32.

To supply each other's wants, and promote each other's prosperity.

18. *How is the freedom of trade to be regarded?*—32.

However reasonably and strongly it may be inculcated in the modern school of political economy, it is but an imperfect right, and necessarily subject to such regulations and restrictions as each nation may think proper to prescribe for itself. Every state may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations, with whom it deals, such distinctions and particular privileges as it may deem conducive to its interests.

19. *Has a nation, in time of peace, the right to interfere with commerce not its own?*—33.

No nation has a right, in time of peace, to interfere with,

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or interrupt, any commerce which is lawful by the law of nations, and carried on between other independant powers, or between different members of the same state.

20. *How far is the right to make commercial treaties recognized by the law of nations?*—34.

Every nation may enter into such commercial treaties, and grant such special privileges as they may think proper; and no nation, to whom the like privileges are not conceded, has a right to take offence, provided those treaties do not affect their perfect rights. A state may enter into a treaty, by which it grants exclusive privileges to one nation, and deprives itself of the liberty to grant similar privileges to any other. These are matters of strict legal right.

21. *How far is the right of passage over foreign territory recognized by the public law?*—34.

Every nation is bound, in time of peace, to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other states, whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners, or their merchandise, injurious to those interest of their own people which they are bound to protect and promote, they are at liberty to withhold the indulgence.

22. *Is this entry of foreigners and their effects an absolute right?*—35.

It is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it.

23. *May the state levy a tax, or toll, upon the persons and property of strangers in transitu over its territory?*—35.

It may, by way of recompense for the expense which the accommodation creates.

24. *What if a nation possess only the upper parts of a navigable river?*—35.

She is entitled to descend to the sea without being embar-

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rassed by useless and oppressive duties or regulations. It is a right of an imperfect obligation, but one that can not justly be withheld without good cause.

25. *Are strangers entitled to protection?*—36.

When foreigners are admitted into a state upon free and liberal terms, the public faith becomes pledged for their protection. The courts of justice ought to be freely open to them as a resort for the redress of their grievances.

26. *Are strangers bound to obey the laws?*—36.

They are equally bound with natives, to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law.

27. *Are governments bound to surrender, upon demand, fugitives from justice?*—36.

It is declared, by some of the most distinguished public jurists, that every state is bound to deny an asylum to criminals, and, upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime was committed. It is the duty of government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial.

28. *What difficulty lies in the way of discharging the duty?*—37.

The only difficulty, in the absence of positive agreement, consists in drawing the line between the class of offenses to which the usage of nations does, and to which it does not apply, inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety.

29. *Is legislative provision for the purpose, requisite?*—37.

It is, for the judicial power can do no more than cause the fugitive to be arrested and detained, until sufficient means and opportunity have been afforded for the discharge of this duty, to the proper organ of communication with the power that makes the demand.

30. *Do ambassadors form an exception to the general case of foreigners resident in the country?*—38.

Yes, they are exempted absolutely from all allegiance, and

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from all responsibility to the laws of the country to which they are deputed, as they are representatives of their sovereigns, and requisite for negotiations and friendly intercourse.

31. *Are their persons inviolable?*—38.

They are, by the consent of all nations.

32. *What if ambassadors insult, or openly attack, the laws or government of the nation to whom they are sent?*—38.

Their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall; or they may be dismissed, and required to depart within a reasonable time; and every government has a perfect right to judge for itself, whether the language or conduct of a foreign minister is admissible.

33. *May force be applied to confine or send away an ambassador, when the safety of the state absolutely requires it?*—38, 39.

The writers on public law allow force to be applied to confine or send away an ambassador, when the safety of the state, which is superior to all other considerations, absolutely requires it.

34. *Is an ambassador considered as if he were out of the territory of the foreign power to which he is accredited?*—39.

By a fiction of law he is so considered; and it is an implied agreement among nations, that the ambassador, while he resides within the foreign state, shall be considered as a member of his own country, retaining his original domicil, and the government he represents has exclusive cognizance of his conduct and control of his person.

35. *Is an ambassador deemed under the protection of the law of nations, in his passage through the territories of a third and friendly power?*—39.

He is, while upon his public mission, in going to and returning from the government to which he is deputed.

36. *Are the attendants of the ambassador attached to his person, under his protection and privilege?*—39.

The attendants of the ambassador, and the effects in his use,

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and the house in which he resides, and his domestic servants, are under his protection and privilege, and equally exempt from the foreign jurisdiction.

37. *What is the distinction between ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers?*—39.

It relates to diplomatic precedence and etiquette, and not to their essential powers and privileges.*

38. *May a government refuse to receive an ambassador?*—40.

It may in its discretion, and without affording any just cause of war, though the act would, probably, excite unfriendly dispositions, unless accompanied with conciliatory explanations.

39. *In a state of civil war, to whom belongs the right of sending ambassadors?*—40.

To the government *de facto*, which is in the actual exercise of power.

40. *How far is the sovereign bound by an act of his minister?*—40.

This will depend upon the nature and terms of his authority. It is now the usual course for every government to reserve to itself the right to ratify, or dissent from, the treaty agreed to by its ambassador. A general letter of credence is the ordinary letter of attorney, or credential, of the minister; and it is not understood to confer a power upon the minister to bind his sovereign conclusively.

41. *What are consuls?*—41.

They are commercial agents, appointed to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them.

* Chargé d'Affaires is a diplomatic representative or minister of the fourth grade; and a resident minister seems not to be equal to a minister plenipotentiary. Nor is a minister plenipotentiary of equal rank and dignity with an ambassador, who represents the person of his sovereign. A minister extraordinary has not by that title any superiority of rank. The United States are usually represented at the courts of the great powers of the first class by ministers plenipotentiary, and at those of an inferior class by a chargé d'affaires; and they do not send representatives of the rank of ambassador in the diplomatic sense.

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42. *At what time were consuls appointed?*—41.

About the twelfth century, in the opulent states of Italy, such as Pisa, Lucca, Genoa, and Venice.

43. *Can a government invest its consuls with judicial power over its own subjects, in a foreign country?*—42.

It can not, without the consent of the government of the foreign country, founded on treaty.

44. *Are nations bound to receive foreign consuls?*—43.

No nation is bound to receive a foreign consul, unless it has agreed to do so by treaty; and the refusal is no violation of the peace and amity between the nations.

45. *What if a consul be guilty of illegal and improper conduct?*—43.

He is liable to have his *exequatur*, or written recognition of his character, revoked, and to be punished according to the laws of the country in which he is consul, or he may be sent back to his own country, at the discretion of the government which he has offended.*

46. *Does the character of consul give any protection to that of merchant, when these characters are united in the same person?*—44.

It does not.

47. *Is a consul considered as a public minister?*—43.

He is not considered such a public minister as to be entitled to the privileges appertaining to that character, nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for a safe conduct. In civil and criminal cases, he is subject to the laws of the country in which he resides.†

48. *What court in the United States, has exclusive jurisdiction in all cases affecting consuls, as well as ambassadors, and other public ministers?*—45.

The Supreme Court of the United States.‡

* *Brown* v. *The United States*, 8 Cranch, 110.

† A foreign consul's exemption from suits in a state court, is a privilege which he can neither waive nor renounce. *Valarino* v. *Thompson*, 3 Seld. (N. Y.) R. 576. *Griffin* v. *Domingues*, 2 Duer (N. Y. S. C.) R. 656.

‡ The Act of Congress to regulate the diplomatic and consular system of the United States, of August 18th, 1856, explicitly defines the functions and authority of consuls.

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LECTURE III.

OF THE DECLARATION AND OTHER EARLY MEASURES OF A STATE OF WAR.

1. *For what is war undertaken?*—47.

For the sake of peace, which is its only lawful end and purpose.

2. *What is just cause of war?*—48.

An injury, either done or threatened, to the perfect rights of the nation, or any of its members, and susceptible of no other redress. The injury may consist, not only in the direct violation of personal or political rights, but in wrongfully withholding what is due, or in the refusal of a reasonable reparation for injuries committed, or of adequate explanation or security in respect to manifest and impending danger.

3. *When only is war to be resorted to?*—48.

It is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself. Every milder method of redress is to be tried, before the nation makes an appeal to arms.

4. *Is an injury to an individual member of the state just cause of war?*—48.

It is, if redress be refused; but a nation is not bound to go to war on so slight a foundation; for it may of itself grant indemnity to the injured party, and if this can not be done, yet the good of the whole is to be preferred to the welfare of a part.

5. *Where one nation is bound by treaty to afford assistance, in a case of war between its ally and a third power, when is the assistance to be given?*—49.

The assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes arise, whether the government, which is to afford the aid, is to judge for itself of the justice of the war on the part of the ally, and to make the right to assist-

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ance depend upon its own judgment. To give assistance in an unjust war, on the ground of the treaty, would be contracting an obligation to do injustice, and no such contract is valid. In doubtful cases, however, the presumption ought rather to be in favor of the ally, and of the justice of the war.

6. *When is the nation, so bound, not obliged to furnish the assistance?*—50.

It is not obliged to furnish it when the case is hopeless, or when giving the succor would expose the state itself to imminent danger. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, or contingent, for this would be to seek a frivolous cause to violate a solemn engagement.

7. *In the case of a defensive alliance, when is the assistance to be rendered?*—50.

The condition of the contract does not call for the assistance, unless the ally be engaged in a defensive war, for, in a defensive alliance, the nation engages only to defend its ally in case he be attacked, and even then we are to inquire whether he be not justly attacked. The defensive alliance applies only to a war first commenced, in point of fact, against the ally; and the power that first declares, or actually begins the war, makes what is deemed, in the conventional law of nations, an offensive war.

8. *With whom resides the right to declare war?*—51.

Many publicists consider the power as a part of the sovereign authority of the state, of which the legislative department is an essential branch. In England, France and Holland, the king alone declares war. In the United States, the power to declare war, as well as of raising the supplies, is confided to the legislature of the Union.

9. *How is war declared?*—53, 54.

In modern times, the practice of a solemn declaration made to the enemy has fallen into disuse. It has become settled by the practice of Europe, that war may lawfully exist by a declaration which is unilateral only, or without a declaration on either side. It may begin with mutual hostilities.

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10. *Why is some formal public act essential?*—55.

To announce to the people at home, their new relations and duties growing out of a state of war; and to apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things.

11. *What effect has such an official act?*—55.

It operates, from its date, to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.

12. *How is war declared by the United States?*—55.

Through an act of Congress.

13. *How far does a state of war bind the subjects of the belligerents?*—55.

Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed.

14. *What right has a state over persons and property of the enemy, found within its territory upon the breaking out of war?*—56.

According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and to detain the persons as prisoners of war. Stipulations allowing foreign subjects a reasonable time, after a war breaks out, to recover and dispose of their effects, or to withdraw them, have now, however, become an established formula in commercial treaties.

15. *What is settled, in the United States, upon the point?*—59.

The Supreme Court has assumed the broad principle, that war gave to the sovereign full right to take the persons, and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself.

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16. *In whom, here, does that right of confiscation exist?*—60.

In Congress; and without a legislative act authorizing its confiscation, property of the enemy could not be judicially condemned.

17. *How would such property be disposed of?*—60.

Until some statute, directly applying to the subject, be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.

18. *What is a hostile embargo?*—60.

It is an act of a hostile nature, and amounting to an implied declaration of war, though liable to be explained away and annulled by a subsequent accommodation between the nations.

19. *What effect has it?*—60.

The seizure is an act at first equivocal as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminate otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure *ab initio*. The property detained is then deemed enemy's property, and liable to condemnation.

20. *What are letters of marque and reprisal?*—61.

Reprisals by commission, granted to one or more injured subjects, in the name and by the authority of a sovereign, as a mode of redress for some specific injury.

21. *Are they compatible with a state of peace?*—61.

They are so considered.

22. *When may letters of marque and reprisal be granted?*—61.

The case arises, when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction. The reprisals may be made in support of the rights of a subject, as well as those of the sovereign, and for the acts of the subject as well as for those of the sovereign.

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23. *When only is the commission of marque and reprisal to be used?*—61.

In a case clearly right—*in re minime dubia.*

24. *What does it authorize?*—61.

The seizure of the property of the subjects, as well as of the sovereign of the offending nation, and to bring it in to be detained as a pledge, or disposed of under judicial sanction, in like manner as if it were a process of distress, under national authority, for some debt or duty withheld.

25. *What was the rule as to the right to confiscate debts contracted by individuals in time of peace, and which remained due to subjects of the enemy at the declaration of war?*—62.

In former times the right to confiscate such debts was admitted as a doctrine of national law. Down to the year 1737, the general opinion of the jurists was in favor of the right.

26. *What is, at present, the rule as to such right of confiscation?*—65.

We may lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the Union, by a special act for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.

27. *What if property have been wrongfully taken by the state before the war and be in the country at the opening of the war?*—65.

Such property can not be seized, but must be restored.

28. *Why so?*—65.

Because to confiscate that species of enemy's property, would be for the government to take advantage of its own wrong.

29. *How does the declaration of war affect trading with the enemy?*—66, 67.

One of the immediate and important consequences of the

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declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. This is equally the doctrine of all the authoritative writers on the law of nations, and the maritime ordinances of the great powers of Europe, and the received law of this country.

30. *From what does the interdiction flow?*—66.

Necessarily, from the principle, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other.

31. *What is the rule as to contracts made with the enemy, during war?*—67.

They are utterly void.

32. *How are commercial partnerships existing prior to the war, between the subjects of the two parties to it, affected by it?*—68.

They are dissolved by the mere force and act of the war itself.

33. *How are other contracts existing prior to the war, affected by it?*—68.

They are not extinguished; the remedy only is suspended.

34. *Why is the remedy suspended?*—68.

From the inability of an alien enemy to sue.

35. *What are ships of truce, or cartel ships?*—68.

A species of navigation intended for the recovery of the liberty of prisoners of war.

36. *Does the interdiction of trade apply to cartel ships?*—68.

It applies to them, and therefore all trade, by means of such vessels, is unlawful, without the express consent of both the governments concerned.

37. *May an ally of one of the belligerents, who carries on the war*

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conjointly with such belligerent, have any commerce with the enemy? —69.

He may not.

38. *Why is this?*—69.

When allied nations are pursuing a common cause, the community of interest, and objects, and action, creates a mutual duty not to prejudice that joint interest.

39. *What if the subject of a co-ally engage in trade with the common enemy?*—69.

It is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally, engaged in a trade with the common enemy, and thereby affording him aid and comfort.

40. *Are English judicial decisions on public law followed by the courts of the United States?*—69.

The English courts are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States on all the leading points of national law.

41. *In what consists the great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations?*—70.

They render certain and stable the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting.

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LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

1. *Is it important to determine, with precision, what relations and circumstances impress a hostile character upon persons and property, in a maritime war?*—74.

It is; and the modern international law of the commercial world is replete with refined and complicated distinctions on the subject.

2. *When does hostile character, in a commercial view, or one limited to certain intents and purposes only, attach?*—74.

It will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, or by sailing under the enemy's flag or passport.

3. *What distinction does this hostile relation, growing out of particular circumstances, assume as valid?*—74.

The distinction which has been taken between a permanent and temporary alien enemy.

4. *In what does that distinction consist?*—72.

A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the adverse belligerent. But he who does not owe a permanent allegiance to the enemy, is an enemy only during the existence and continuance of certain circumstances.

5. *How far does the possession of the soil impress upon the owner the character of the country?*—74.

So far as the products of the soil are concerned, wherever the local residence of the owner may be. The produce of a hostile soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize, when taken in course of transportation to any other country.

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6. *What if a person have a settlement in a hostile country by the maintenance of a commercial establishment there?*—74, 75.

He will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. For all commercial purposes, the domicil of the party, without reference to the place of birth, becomes the test of national character.

7. *What if he resides in a neutral country?*—75, 76.

He enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disadvantages, whatever they may be, of the country of his residence.

8. *Is he permitted to acquire a neutral domicil, that will protect a trade in opposition to the belligerent claims of his native country, if he emigrate from that country* flagrante bello?—76.

He is not. Vattel denies explicitly the right of emigration in a war in which his country is involved. It would be a criminal act. This doctrine is considered as settled in the United States.

9. *What limitation is there upon the principle of determining the character from residence?*—76.

The only limitation is, that the party must not be found in hostility to his native country. He must do nothing inconsistent with his native allegiance.

10. *What state of facts constitutes a residence so as to change, or fix the commercial character of the party?*—76.

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations. The *animus manendi* appears to have been the point to be settled. The presumption arising from actual residence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial.

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11. *What if there be no* animus manendi, *and the residence be involuntary or constrained?*—77.

Then a residence, however long, does not change the original character of the party, or give him a new or hostile one.

12. *What, in each case, is the real subject of inquiry?*—77.

The *quo animo;* and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual, or only an implied residence.

13. *When the residence is once fixed, and has communicated a national character to the party, is it divested by a periodical absence or even by occasional visits, to his native country?*—77.

It is not.

14. *Must the residence be invariably personal, to impress with a national character?*—77.

The general rule is, that a neutral merchant may trade in the ordinary manner, in the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person.

15. *When does a national character, acquired by residence, cease?*—78.

It may be thrown off at pleasure, by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bona fide*, to quit the country *sine animo revertendi.*

16. *If a citizen of the United States should establish his commercial domicil in a foreign country, and hostilities afterwards break out between that country and this, would his property, shipped before knowledge of the war, be liable to capture?*—79.

It would.*

17. *On what ground?*—79.

On the ground that his permanent residence had stamped him with the national character of that country.

18. *Is the doctrine of enemy's property, arising from a domicil in an enemy's country, enforced strictly?*—79.

It is; and equitable qualifications of the rule are generally

* 8 Cranch, R., 253.

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disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty.

19. *What is the rule as to Asia and Africa?*—77.

An immiscible character is kept up, and Europeans trading under the protection of a factory, take the national character of the establishment under which they live and trade. Foreigners are not admitted there, as in Europe and here, into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.

20. *What if a person connects himself with a house of trade in the enemy's country, in time of war, or continues, during a war, a connexion formed in time of peace?*—80.

He is considered as impressed with a hostile character, in reference to so much of his commerce as may be connected with that establishment. The rule is the same whether he maintains that establishment as a partner or as a sole trader.

21. *What if there be a partnership between two persons, the one residing in a neutral, and the other in a belligerent country?*—80, 81.

The trade of one of them with the enemy will be held lawful, and that of the other unlawful; and, consequently, the share of one partner in the joint traffic will be condemned, while that of the other will be restored.

22. *What rule obtains as regards the colonial trade of the enemy?*—81.

That a special license, granted by a belligerent to a neutral vessel, to trade to her colony, in those branches of commerce which were before confined to native subjects, would warrant the presumption that such vessel was adopted and naturalized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property.

23. *Does the English rule go further than this?*—81.

It does, and annexes a hostile character, and the penal consequences of confiscation, to the ship and cargo of a neutral engaged in the colonial or coasting trade of the enemy, not open to

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foreigners in time of peace, but confined to native subjects by the fundamental regulations of the state.

24. *By what appellation is the prohibition, according to the English rule, known?*—82.

As the rule of 1756.

25. *Have the United States admitted the legality of the rule of* 1756?—83.

They have not, but have constantly and earnestly protested against it, and contended that the trade must have a direct reference to the hostile efforts of the belligerents, like dealing in contraband, in order to render it breach of neutrality.

26. *What effect has sailing under the flag and pass of the enemy?* —85.

It is another mode by which a hostile character may be affixed to property.

27. *Why is the rule that a hostile character may be thus affixed to property, necessary?*—85.

To prevent the fraudulent mask of enemy's property.

28. *Is there a distinction made in the English cases, as to this rule, between the ship and the cargo?*—85.

There is.

29. *What is it?*—85.

Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English cases have never carried the principle to that extent, as to cargoes laden before the war. If the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo.

30. *What is the doctrine in the United States on this point?*—85.

The doctrine of the federal courts in this country has been very strict on this point, and it has been frequently decided, that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to

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the object of the voyage, or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war.*

31. *What is the rule concerning property* in transitu, *as to protection from capture?*—86.

That property which has a hostile character at the commencement of the voyage, can not change that character by assignment while it is *in transitu*, so as to protect it from capture. The ownership of the property is deemed to continue as it was at the time of the shipment, until actual delivery.

32. *Why is this?*—86.

It would lead to fraudulent contrivances, to protect the property from capture, by colorable assignments to neutrals. This illegality of transfer, during or in contemplation of war, is for the sake of the belligerent right, and to prevent secret transfers from the enemy to neutrals in fraud of that right, and upon conditions and reservations which it might be impossible to detect.

33. *What if property be shipped from a neutral to the enemy's country, under a contract to become the property of the enemy upon arrival?*—86.

It may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy.

* *The Julia*, 8 Cranch, R. 181. *The Aurora*, ib. 203. *The Hiram*, ib. 444. *The Ariadne*, 2 Wheat., R. 143. *The Caledonian*, 4 Wheat., R. 100.

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LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN RELATION TO EACH OTHER.

1. *What means are allowed, by the law of nations, as requisite to the end of war?*—89.

The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security.

2. *How have the earlier writers regarded a state of war, as to the degree of violence and destruction allowed?*—89.

If we follow them, there is no limitation to the career of violence and destruction. They have considered a state of war as a dissolution of all moral ties, and a license for every kind of disorder and intemperate fierceness. An enemy was regarded as a criminal and an outlaw, who had forfeited his rights, and whose life, liberty and property lay at the mercy of the conqueror. Every thing done against an enemy was held to be lawful. He might be destroyed, though unarmed and defenceless. Fraud might be employed as well as force, and force without any regard to the means.

3. *Have these barbarous rights of war been questioned?*—89.

Yes; they have been questioned and checked in the progress of civilization.

4. *Is there a difference in the rights of war, as carried on by land and at sea?*—92.

There is.

5. *What is the object of a maritime war?*—92.

The destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end; and it is allowed in maritime wars by the law and practice of nations.

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6. *What limitations are imposed upon the operations of war by land?*—92.

Great limitations, though depredations upon private property, and despoiling and plundering the enemy's territory are still too prevalent, especially when the war is assisted by irregulars. The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expense of maintaining order and affording protection.

7. *What if the conqueror goes beyond these limits wantonly?*—92, 93.

If he goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, and destroys private dwellings, or public edifices, devoted to civil purposes only, or makes war upon monuments of art and models of taste, he violates the modern usages of war.

8. *To whom should retaliation be confined?*—93.

Retaliation, to be just, ought to be confined to the guilty individuals who may have committed some enormous violation of public law.

9. *What if subjects confine themselves to simple defence, and captures are made?*—94.

They are to be considered as acting under the presumed order of the state, and are entitled to be treated by the adversary as lawful enemies; and the captures which they make in such a case, are allowed to be lawful prize.

10. *May they engage in offensive hostilities, without the express permission of their sovereign?*—94.

They can not; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the protection of the mitigated rules of modern warfare.

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11. *When were commissions to cruise made necessary?*—95.

It was not until the fifteenth century that subjects were forbidden to fit out vessels to cruise against enemies without license.

12. *What is now the practice?*—95.

Vessels are now fitted out and equipped by private adventurers at their own expense, to cruise against the common enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission.

13. *When only is title to hostile property captured, acquired?*—95.

The doctrine of the law of nations is considered to be, that private citizens can not acquire a title to hostile property, unless seized under a commission.

14. *What if they depredate upon the enemy without a commission?*—95.

If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture.

15. *How are captures by private armed vessels, without a commission, regarded?*—96.

The captors are lawful combatants, but they have no interest in the prizes they may take.

16. *In whose favor are such captures made?*—96.

It is the settled law of the United States, that all captures made by non-commissioned captors, are made for the government.

17. *What security are the owners of privateers required to give?*—97.

Adequate security that they will conduct the cruise according to the laws and usages of war, and the instructions of the government, and that they will regard the rights of neutrals, and bring their prizes in for adjudication.

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18. *How far are the owners of private armed vessels liable, in damages, for illegal conduct?*—99.

We may consider it to be the settled rule of law and equity, that the measure of damages is the value of the property unlawfully injured or destroyed, and that each individual owner is responsible for the entire damages, and not ratably *pro rata*.

19. *What is the law as to taking foreign commissions?*—100.

Vattel holds it to be inexcusable and base to take a commission from a foreign prince, to prey upon the subjects of a state in amity with one's native country. The laws of the United States have made ample provision on this subject, and they may be considered as in affirmance of the law of nations, and as prescribing specific punishment for acts which were before unlawful. An act of Congress prohibits citizens to accept, within the jurisdiction of the United States, a commission, or for any person, not transiently within the United States, to consent to be retained, or enlisted, to serve a foreign state, in war, against a government in amity with us. It likewise prohibits American citizens from being concerned, without the limits of the United States, in fitting out, or otherwise assisting, any private vessel of war, to cruise against the subjects of friendly powers.

20. *What if a cruiser have commissions from two different powers?*—100.

The better opinion is, that she is liable to be treated as a pirate; for, though the two powers may be allies, yet one of them may be in amity with a state with whom the other is at war.

21. *What is the law and practice as to the proceeds of captured property?*—101.

The right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives under the grant of the state. But the general practice, under the laws and ordinances of belligerent governments, is, to distribute the proceeds of captured property, when duly passed upon, and condemned as prize, (and whether captured by public or private

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commissioned vessels,) among the captors, as a reward for bravery, and a stimulus to exertion.

22. *When a prize is taken at sea, what follows?*—101.

It must be brought with due care into some convenient port, for adjudication by a competent court.

23. *Strictly speaking, as between the belligerent parties, when does the title pass?*—101.

It passes, and is vested, when the capture is complete.

24. *When, formerly, was the capture held to be complete?*—101.

It was held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone.

25. *Between whom only does the question, when the title passes, arise?*—101.

It never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a recaptor.

26. *What if a captured ship escapes from the captor, or is retaken, or if the owner ransoms her?*—101.

His, the owner's, property is thereby revested.

27. *What if neither of these events happen?*—101.

The question as to the change of title is open to dispute.

28. *What, by the modern usage of nations, is sufficient to change the property, in the case of a maritime capture?*—102.

A judicial inquiry must pass upon the case. The present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of the fact to support his title.

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29. *Until the capture becomes invested with the character of prize by a sentence of condemnation, how is the right of property situated?*—102.

It is in abeyance, or in a state of legal sequestration. It can not be alienated, or disposed of, but the possession of it by the government of the captor, is a trust for the benefit of those who may be ultimately entitled.

30. *To what courts belong the question of prize or no prize?*—103.

It belongs exclusively to the courts of the country of the captor, sitting either in the country of the captor, or of his ally. The prize court of an ally can not condemn.

31. *May the prize court of the captor sit in a neutral territory?*—103.

It may not. Neutral ports are not intended to be auxiliary to the operations of the powers of war; and the law of nations has clearly ordained, that a prize court of a belligerent captor can not exercise jurisdiction in a neutral country.

32. *May a prize court exercise jurisdiction over prizes lying in a neutral port?*—104.

It may. Our Supreme Court* has followed the English rule, and has held valid the condemnations, by a belligerent court, of prizes carried into a neutral port, and remaining there.

33. *When circumstances will not permit property captured at sea to be sent into port, what choice has the captor in disposing of it?*—104.

He may either destroy it, or permit the original owner to ransom it.

34. *What is a ransom bill?*—104.

It is, when not locally prohibited, a war contract, protected by good faith and the law of nations; and notwithstanding that the contract is considered in England as tending to relax the energy of war, and deprive cruisers of the chance of recapture, it

* Whenever, in the course of this work, the Supreme Court, without addition, is alluded to, the Supreme Court of the United States is intended.

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is, in many views, highly reasonable and humane. Other maritime nations regard ransoms as binding, and to be classed among the few legitimate *commercia belli*. They have never been prohibited in this country.

35. *What is the effect of a ransom?*—105.

It is equivalent to a safe conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruisers to respect the safe conduct thus given.

36. *What does the safe conduct implied in a ransom bill require?*—105.

That the vessel should be found within the course prescribed, and within the time limited by the contract, unless forced out of her course by stress of weather, or unavoidable necessity.

37. *What if the vessel ransomed perishes by a peril of the sea, before arrival in port?*—105.

The ransom is nevertheless due, for the captor has not insured the prize against the perils of the sea, but only against recapture by cruisers of his own nation, or of the allies of his country.

38. *How may the captor be deprived of the entire benefit of his prize, as well as of the ransom bill?*—107.

Either by recapture, or rescue.

39. *To what do the questions arising out of them lead?*—107.

To the consideration of postliminy and salvage.

40. *What was the* jus postliminii ?—108.

It was a fiction of the Roman law, by which persons or things taken by the enemy, were restored to their former state, upon coming again under the power of the nation to which they formerly belonged. It is a right recognized by the law of nations, and contributes essentially to mitigate the calamities of war.

41. *What if property taken by the enemy is either recaptured, or rescued from him, by the fellow-subjects or allies of the original owner?*—108.

It does not become the property of the recaptor or rescuer,

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as if it had been a new prize, but it is restored to the original owner, by right of postliminy, upon certain terms.

40. *Are movables entitled to the full benefit of postliminy?*—108.

They are not by the strict rules of the law of nations, unless retaken from the enemy promptly after the recapture, for then the original owner neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them.

41. *Does the right of postliminy take effect in neutral countries?*—109.

It does not, because the neutral nation is bound to consider the war on each side as equally just, so far as relates to its effects, and to look upon every acquisition, made by either party, as a lawful acquistion; with the exception of cases, where the capture itself is an infringement of the jurisdiction and rights of the neutral power.

42. *Where only does the right of postliminy take place?*—109.

Only within the territories of the nation of the captor, or of his ally.

43. *What if a prize be brought into a neutral port by the captors?*—109.

It does not, by the law of postliminy, return to the former owner, because neutrals are bound to take notice of the military right which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. They are bound to take the fact for the law.

44. *With respect to persons does the right of postliminy take place?*—109.

It does, even in a neutral country.

45. *What if a captor bring his prisoners into a neutral port?*—109.

He may, perhaps, confine them on board his ship, as being by fiction of law part of the territory of his sovereign, but he has no control over them on shore.

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46. *When is the acquisition of real property, by the conqueror, fully consummated?*—110.

It is not fully consummated until confirmed by the treaty of peace, or by the entire submission, or destruction of the state to which it belonged.

47. *What if it be recovered by the original sovereign?*—110.

It returns to the former proprietor, notwithstanding it may, in the meantime, have been transferred by purchase.

48. *What if the real property, as a town or portion of the territory, for instance, be ceded to the conqueror by the treaty of peace?*—110.

The right of postliminy is gone for ever, and a previous alienation by the conqueror would be valid.

49. *When, in a land war, is the acquisition of movable property consummated?*—110.

After it has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner. It goes by the name of booty.

50. *What if the treaty of peace makes no particular provision relative to captured property?*—111.

It remains in the same condition in which the treaty finds it, and is tacitly conceded to the possessor.

51. *Does the right of postliminy cease with the conclusion of peace?*—111.

It no longer exists after the conclusion of the peace. It is a right which belongs exclusively to a state of war. The intervention of peace cures all defects of title.

52. *Is every power obliged to observe these rules of the law of nations relative to postliminy?*—111.

It is, where the interests of neutrals are concerned. But, in cases arising between its own subjects, or between them and those of its allies, the principle may undergo such modifications as policy may dictate.

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53. *What is the rate of salvage?*—112.

It is different, as allowed by different nations.

54. *Is the allotment of salvage, on recapture or rescue, a question of municipal law merely?*—112.

It is not, except as to the particular rates of it. It is a question of the *jus gentium*, when the subjects of allies or neutral states claim the benefit of the recaption.

LECTURE VI.

OF THE GENERAL RIGHTS AND DUTIES OF NEUTRAL NATIONS.

1. *What principle, as to neutrals, has the public law of Europe established?*—115.

That, in time of war, countries not parties to the war, or interposing in it, shall not be materially affected by its action; but they shall be permitted to carry on their accustomed trade, under a few necessary restrictions.

2. *Should neutrals stand impartial between the belligerent parties?*—115, 116.

The neutral is not to favor one of them to the detriment of the other; and it is an essential character of neutrality, to furnish no aids to one party, which the neutral is not equally ready to furnish to the other.

3. *Is a loan of money to one of the belligerent parties a violation of neutrality?*—116.

It is so considered.

4. *Does the neutral duty prohibit the fulfillment of antecedent engagements?*—116.

It does not extend so far. They may be kept consistently

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with an exact neutrality, unless they go so far as to require the neutral nation to become an associate in the war.

5. *What if a nation be under a previous stipulation, made in time of peace, to furnish a given number of ships or troops to one of the parties at war?*—116.

The contract may be complied with, and the state of peace preserved except so far as the auxiliary forces are concerned.

6. *What if a neutral power be under contract to furnish succors to one of the parties at war, an ally, and that ally was the aggressor?*—116, 117.

He is said not to be bound, in such case, if his ally was the aggressor; and in this solitary instance the neutral may examine into the merits of the war, so far as to see whether the *casus fœderis* exists.

7. *Has a neutral a right to pursue his ordinary commerce, and without risk?*

A neutral has a right to pursue his ordinary commerce, and he may become the carrier of the enemy's goods, without being subject to any confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property.

8. *Is the property of a neutral inviolable, though it be found in the vessels of enemies?*—117.

It is.

9. *Does the general inviolability of the neutral character protect the property of the belligerents, when within neutral jurisdiction?*—117.

It does. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it.

10. *What if the enemy be attacked, or any capture made, under neutral protection?*—117.

The neutral is bound to redress the injury, and effect restitution.

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11. *What is the doctrine of the United States, as to the inviolability of neutral territory?*—118.

That no use of neutral territory for the purposes of war, can be permitted.

12. *What if a belligerent cruiser inoffensively passes over a portion of water lying within neutral jurisdiction?*—119.

That fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. To vitiate a subsequent capture, the passage must at least have been expressly refused, or the permission to pass obtained under false pretenses.

13. *Upon what depends the right of a refusal of a pass, over neutral territory, to the troops of a belligerent power?*—119.

It depends more upon the inconvenience falling on the neutral state, than on any injustice committed upon the third party, who is to be affected by the permission or refusal.

14. *What if the intermediate neutral state grants a passage to belligerent troops?*—119.

It is no ground of complaint against the neutral state, though inconvenience may thereby ensue to the adverse belligerent. It is a matter resting in the sound discretion of the neutral power, who may grant or withhold the permission without any breach of neutrality.

15. *May a belligerent power claim the right of passage through neutral territory?*—119.

It can not, unless founded upon a previous treaty, and it can not be granted by a neutral, where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents.

16. *When only has a neutral the right to inquire into the validity of a capture?*—121.

In cases only, in which the rights of neutral jurisdiction are violated.

17. *In such cases, will the neutral restore the property?*—121.

He will restore it, if found in the hands of the offender, and

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within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor.

18. *Who may raise the objection to a capture and title founded on the violation of neutral rights?*—121.

It belongs solely to the neutral government to raise the objection. The adverse belligerent has no right to complain, when the prize is duly libeled before a competent court.

19. *In the case of prizes brought within a neutral port, how far does the neutral sovereign exercise jurisdiction?*—121, 122.

So far as to restore the property of its own subjects, illegally captured.

20. *What were the rules of neutrality declared by Congress in* 1793, *to be observed by the belligerent powers in their intercourse with this country?*—122.

These rules were, that the original arming or equipping of vessels in our ports, by any of the powers at war, for military service was unlawful; and no such vessel was entitled to an asylum in our ports. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but if it were of a nature solely applicable to war, it was unlawful. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel, being within the same, and belonging to an adverse belligerent power, should depart until twenty-four hours after the former, without being deemed to have violated the law of nations.

21. *Have Congress made other provisions on the subject of neutrality?*—123.

Congress have repeatedly, by statute, made suitable provision for the support and due observance of similar rules of neutrality, and given sanction to the principle of them, as being founded on the universal law of nations. It is declared to be a misdemeanor for any citizen of the United States, within the territory or ju-

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risdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United States, on board of any foreign armed vessel, within the territory or jurisdiction of the United States, to enlist, or enter himself, or hire, or retain another person to enlist, or enter himself; or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted, or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or mariner, or seaman; or to fit out and arm, or to increase or augment the force of any armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power, with whom we are at peace; or to begin, or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince, or state, or of any colony, district, or people, with whom we are at peace; or to hire or enlist troops, or seamen for foreign military, or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities in foreign service, against a nation at peace with us; and the vessel, in the latter case, is made subject to forfeiture.

22. *What has been decided by the Supreme Court, as to captures made by a vessel so illegally fitted out to cruise or commit hostilities, in foreign service, against a nation at peace with us?*—123.

That such captures, whether made by a public or private armed ship, were torts, and that the original owner was entitled to restitution, if the property was brought within our jurisdiction, but that an illegal outfit did not affect a capture made after a cruise to which the outfit had been applied, had terminated. The offense was deposited with the voyage, and the *delictum* ended with the termination of the cruise.*

23. *May a belligerent vessel bring her prize into a neutral port, and sell it?*—123.

She may, consistently with a state of neutrality, until prohibited by the neutral power.

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24. *Is the neutral power at liberty to refuse this privilege?*—123, 124.

She is, provided the refusal be made, as the privilege ought to be granted, to both parties, or to neither.

25. *Do neutral ships afford protection to enemy's property?*—124.

They do not, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is now a clear and well-settled principle of the law of nations.

26. *How is enemy's property, in such case, seized and condemned?*—125.

It is said to be seized and condemned, not *ex delicto*, but only *ex re*. The capture of it by the enemy is a delivery to the person who, by the rights of war, was substituted for the owner.

27. *Are the effects of neutrals found on board of enemy's vessels, free?*—128, 129.

They are, and the property of the neutral is to be restored without any compensation for detention, and the other necessary inconveniences incident to the capture. The belligerent flag communicates no hostile character to neutral property. The character of the property depends upon the fact of ownership, and not upon the character of the vehicle in which it is found.

28. *Upon what rests the rule of public law, that the property of an enemy is liable to capture in the vessel of a friend?*—130.

It is declared, on the part of our government, to have no foundation in natural rights; and, that the usage rests entirely on force.

29. *Is the captor of the enemy's vessel entitled to freight from the owner of neutral goods found on board and restored?*—131.

This has been a matter of discussion. Under certain circumstances, the captor has been considered to be entitled to freight, even though the goods were carried to the claimant's own country and restored; and he clearly is entitled to freight, if he performs the voyage, and carries the goods to the port of original destination.

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30. *Does the principle of immunity extend to neutral property on board an armed belligerent vessel?*—132.

In this country, the Supreme Court has decided that it does, and that the goods do not lose their neutral character even if resistance be made by the armed vessel, provided the neutral had not aided in such armament or resistance, notwithstanding he had chartered the whole vessel, and was on board at the time of the resistance. In England, the High Court of Admiralty made a cotemporary decision of an opposite character.

LECTURE VII.

OF RESTRICTIONS UPON NEUTRAL TRADE.

1. *What is the principal restriction imposed, by the law of nations, on the trade of neutrals?*—135.

The prohibition to furnish the belligerent parties with warlike stores, and other articles which are directly auxiliary to warlike purposes. Such goods are denominated contraband of war.

2. *What goods are contraband of war?*—135.

In the attempt to define them the authorities vary, or are deficient in precision, and the subject has long been a fruitful source of dispute between neutral and belligerent nations.

3. *What does Grotius define contraband of war?*—135.

He distinguishes between things which are useful only in war, as arms and ammunition, and things which serve merely for pleasure, and things which are of a mixed nature, and useful both in peace and war. He agrees with other writers in prohibiting neutrals from carrying articles of the first kind to the enemy, as well as in permitting the second kind to be carried. As to articles of the third class, which are of indiscriminate use in peace and war, as money, provisions, ships, and naval stores, he says, that they are sometimes lawful articles of neutral com-

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merce, and sometimes not; and the question will depend upon circumstances existing at the time. They would be contraband if carried to a besieged town, camp, or port.

4. *What become contraband in a naval war?*—136.

In a naval war, it is admitted that ships, and materials for ships, become contraband, and horses and saddles may be included.

5. *What are contraband according to Vattel?*—136.

He says, in general terms, that commodities particularly used in war are contraband, such as arms, military and naval stores, timber, horses, and even provisions, in certain junctures. when there are hopes of reducing the enemy by famine.

6. *What is held as to sail cloth?*—136.

It is now held to be universally contraband, even on a destination to ports of mere mercantile naval equipment.

7. *Are materials for the building, equipment, and armament of ships of war, contraband?*—137.

The executive government of this country has frequently conceded, that such materials as timber and naval stores were contraband. But it does not seem that ship timber is, *in se*, in all cases, to be considered a contraband article, though destined to an enemy's port.

8. *Are provisions regarded as contraband?*—139.

The modern established rule is, that provisions are not generally contraband, but may become so, under circumstances arising out of the particular situation of the war, or the condition of the parties engaged it.

9. *What are the principal circumstances which tend to preserve provisions from being liable to be treated as contraband?*—139.

One is, that they are the growth of the country which produces them. Another circumstance, to which some indulgence is shown by the practice of nations, is when the articles are in their native and unmanufactured state. Wheat is not considered as so objectionable a commodity, when going to an enemy's

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country, as any of the final preparations of it for human use. The most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use.

10. *Is the character of the port to which the articles are going a test?*—140.

It is. If the port be a commercial one, it is presumed the articles are going for civil use; but if its predominant character be that of a port of naval military equipment, it will be presumed that the articles are going for military use.

11. *What determines an article to be contraband?*—141.

The *usus belli.*

12. *When goods are clearly shown to be contraband, what follows?*—141.

Confiscation to the captor is the natural consequence. It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign.

13. *What if only part of a cargo be contraband?*—143.

Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation.

14. *With what loss is the act of carrying contraband articles attended?*—143.

Only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances.

15. *Among such circumstances, which are considered the most heinous?*—143.

A false destination and false papers.

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16. *In those cases, and in all cases of fraud in the owner of the ship, or of his agent, how far is the penalty carried?*—143.

It is carried beyond the refusal of freight and expenses, to the confiscation of the ship, and the innocent parts of the cargo.

17. *May a neutral forfeit the immunities of his national character by violations of blockade?*—144.

He may. Among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynkershoeck and Grotius consider the carrying of supplies to a besieged town, or blockaded port, as an offense exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says he may be treated as an enemy.

18. *What is necessary in order to apply the law of blockade?*—144.

The fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron alloted for the purpose of its execution, must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade.

19. *What amounts to an entire defeasance of the blockade?*—144.

The failure of either of the points requisite to establish the existence of a legal blockade, even though the notification of the blockade had issued from the authority of the government itself.

20. *How is a blockade defined?*—145.

The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance in Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous. The government of the United States has uniformly insisted that the blockade should be effect-

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ive, by the presence of a competent force, stationed, and present, at or near the entrance of the port.

21. *Does the occasional absence of the blockading squadron suspend the blockade?*—145.

Its occasional absence, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade provided the suspension and the reason of it be known.

22. *How is the attempt to take advantage of such an accidental removal, regarded?*—146.

As an attempt to break the blockade, and as a mere fraud.

23. *When ought the commerce of neutrals to the place blockaded, to be free?*—146.

When the blockade is raised by the enemy, as by applying the naval force, or a part of it, though only for a time, to other objects, or by the mere remissness of the cruisers.

24. *What if the blockade be raised voluntarily, as by a superior force?*—146.

It puts an end to it absolutely.

25. *What is the object of a blockade?*—146.

It is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port.

26. *Is the act of egress culpable?*—146.

It is as culpable as the act of ingress, if it be done fraudulently; and a ship coming out of a blockaded port is, in the first instance, liable to seizure, and to obtain a release, the party must give satisfactory proof of the innocence of his intention.

27. *Does a blockade extend to a neutral vessel found in port when the blockade was instituted?*—146, 147.

It does not; nor does it prevent her coming out with a cargo *bona fide* purchased, and laden on board, before the commencement of the blockade.

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28. *Should the place be invested by land as well as by sea, to constitute a legal blockade?*—147.

The modern practice does not require it; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communication.

29. *How is notice of the blockade communicated?*—147.

In two ways; either actually, by a formal notice from the blockading power; or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it.

30. *What effect has notice to a foreign government of a blockade?*—147.

It is notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is a duty of the neutral government to communicate the notice to their people.

31. *What difference is there between a blockade regularly notified, and one without such notice?*—147.

In the former case, the act of sailing for the blockaded place, with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas, in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance, may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination.

32. *How is the question of notice of the blockade determined?*—148.

It is a question of evidence, to be determined by the facts applicable to the case.

33. *May information, as to the existence of the blockade be sought at the mouth of the port?*—148.

It can not in any case. A neutral can not be permitted to

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place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever he pleases, and slip in without obstruction.

34. *Is the fact of clearing out, or sailing for a blockaded port, in itself innocent?*—149.

It is, unless it be accompanied with knowledge of the blockade.

35. *How is the fact regarded, if accompanied with such knowledge?*—149.

By the law of the English prize courts, sailing for a blockaded port, knowing it to be blockaded, is, in itself, an attempt, and an act sufficient to charge the party with a breach of the blockade, without reference to the distance between the port of departure and the port invested, or the extent of the voyage performed when the vessel was arrested. The Supreme Court has coincided essentially with this doctrine.

36. *What is the consequence of a breach of blockade?*—151.

The confiscation of the ship; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and it lays with them to remove the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owner.

37. *If a ship has contracted guilt by a breach of blockade, when is the offense discharged?*—151.

Not until the end of the voyage. The penalty never travels on with the vessel, further than to the end of the return voyage; and if she is taken in any part of that voyage, she is taken *in delicto*. The penalty for a breach of blockade is also held to be remitted, if the blockade has been raised before the capture. The *delictum* is completely done away when the blockade ceases.

38. *Is the conveyance of hostile dispatches among the acts of illegal assistance to a belligerent?*—152.

It is, and deemed to be most injurious and of a hostile and noxious character.

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39. *What is the appropriate remedy for this offense?*—152.

The confiscation of the ship; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate; and, especially, if there be an active interposition in the service of the enemy, concerted and continued in fraud.

40. *What distinction is made between carrying dispatches of the enemy between different parts of his dominions, and carrying dispatches of an ambassador from a neutral country to his own sovereign?*—152, 153.

The effect of the former dispatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that communications of the latter sort are of a hostile nature.

41. *Why has the law of nations armed belligerents with the rights of visitation and search at sea?*—153.

In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real, as well as assumed character of all vessels upon the high seas.

42. *Upon what is the right founded?*—153.

It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace unless conceded by treaty.

43. *What if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or dispatches?*—153.

She is liable to be taken and brought in for adjudication before a prize court.

44. *What is the penalty for the violent contravention of this right?*—154.

The confiscation of the property so withheld from visitation, and the infliction of this penalty is conformable to the settled practice of nations, as well as to the principles of the municipal jurisprudence of most countries in Europe.

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45. *Are England and the United States agreed as to this right of visitation and search?*—155.

They are. The doctrine of the English admiralty on the right of visitation and search, and on the limitation of the right, has been recognized, in its fullest extent, by the courts of justice in this country.

46. *What is the penalty for resistance of search?*—155.

Confiscation to all vessels, without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship.

47. *Does the right of search apply to public ships of war?*—155.

It does not. Their immunity from the exercise of any civil or criminal jurisdiction, but that of the sovereign power to which they belong, is uniformly asserted, claimed and conceded.

48. *May the exercise of the right of search involve the cruiser in a trespass?*—156.

The mere exercise of the right involves the cruiser in no trespass, for it is strictly lawful; but if he proceeds to capture the vessel as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. It is not the search, but the subsequent capture, which is treated in such a case as a tortious act.

49. *When is a rescue unlawful?*—157.

When effected by the crew after capture, and when the captors are in actual possession.

50. *Should the neutral vessel be furnished with documentary evidence of her neutral character?*—157.

The neutral is bound, not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character.

51. *What are the most material of these documents?*—157.

The register, passport or sea-letter, muster-roll, log-book, charter-party, invoice and bill of lading.

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52. *What effect has the concealment of the papers material for the preservation of the neutral character?*—157.

It justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation.

53. *What effect has the spoliation of such papers?*—157, 158.

Their spoliation is a still more aggravated and inflamed circumstance of suspicion. The fact may exclude further proof, and be sufficient to infer guilt; but it does not, in England, as it does by the maritime laws of other countries, create an absolute presumption *juris et de jure*. The Supreme Court has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation.

LECTURE VIII.

OF TRUCES, PASSPORTS, AND TREATIES OF PEACE.

1. *What is a truce?*—159.

A suspension of arms.

2. *What effect has it?*—159.

It does not terminate the war, but it is one of the *commercia belli*, which suspends its operations.

3. *How is a particular distinguished from a general truce?*—159.

A particular truce is only a partial cessation of hostilities, as between a town and an army besieging it. But a general truce applies to the operations of the war, and, if it be for a long or indefinite period of time, it amounts to a temporary peace, which leaves the state of the contending parties, and the questions between them, in the same situation as it found them.

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4. *By whom is a truce made?*—159.

A partial truce may be made by a subordinate commander, and it is a power necessarily implied in the nature of his trust; but it is requisite to a general truce, or suspension of hostilities throughout the nation, or for a great length of time, that it be made by the sovereign of the country, or by his special authority.

5. *What is the general principle on the subject?*—159, 160.

If a commander makes a compact with the enemy, and it be of such a nature, that the power to make it be reasonably implied from the nature of the trust, it will be valid and binding though he abuse his trust.

6. *From what time does a truce bind the contracting parties?*—160.

From the time it is concluded; but it does not bind the individuals of the nation, so as to render them personally responsible for a breach of it, until they have had actual or constructive notice of it.

7. *What effect has a truce?*—160.

It only temporarily stays hostilities; and each party to it may do whatever he may have a right to do in time of peace. He may continue active preparations for war, by repairing fortifications, levying and disciplining troops, and collecting provisions and articles of war, within his own territories.

8. *How is it in the case of a truce between the governor of a fortified town and the army besieging it?*—160, 161.

He may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement; but he is justly restrained from doing what would be directly injurious to the enemy, and could not safely be done in the midst of hostilities. Neither party is at liberty to continue works constructed either for attack or defense, and which could not safely be done if hostilities had continued; for this would be to make a mischievous and fraudulent use of the cessation of arms. All things should remain as they were in the places contested, and of which the possession was disputed at the moment of the conclusion of the truce.

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9. *At the expiration of the truce, may hostilities recommence without any fresh declaration of war?*—161.

They may; but if the truce be for an indefinite time, justice and good faith require due notice of an intention to terminate it.

10. *What is a passport?*—162.

A passport, or safe conduct is a privilege granted in war, and exempting the party from the effect of its operation, during the time, and to the extent prescribed in the permission.

11. *Who may grant passports?*—162.

The power to grant them flows from the sovereign authority, but it may be delegated by the sovereign to persons in subordinate command, and they are invested with that power, either by an express commission, or by the nature of their trust. The general of an army, from the very nature of his power, can grant safe conducts.

12. *Is the permission transferable by the person named in the passport?*—162.

It is not.

13. *Why not?*—162.

It may be that the government had special reasons for granting the privilege to the very individual named, and it is presumed to be personal.

14. *To what is the sovereign who grants security by a passport, morally bound?*—162.

To afford such security against any of his subjects or forces, and to make good any damage the party may sustain by a violation of the passport.

15. *What does a safe conduct generally include?*—162.

The necessary baggage and servants of the person to whom it is granted.

16. *What effect is given to a license by the enemy, to the subjects*

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of the adverse party, to carry on a specified trade, by the government which grants them?—163.

It is the resumption of a state of peace to the extent of the license. In the country which grants them, licenses to carry on a pacific commerce are *stricti juris*, as being exceptions to a general rule; though they are not to be construed with pedantic accuracy, nor will every small deviation be held to vitiate the fair effect of them.

17. *Whenever any part of the trade assumed under the license is denuded of authority under it, what is the consequence?*—164.

Such part is subject to condemnation.

18. *To whom is the use of the license to trade limited?*—164.

To the precise persons for whose benefit it was obtained.

19. *What effect have treaties of peace?*—165.

When made by the competent power, they are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money can not be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. All treaties, made by that department of the government which is intrusted with the treaty-making power, become of absolute efficacy, because they are the supreme law of the land.

20. *May the power competent to bind the nation by treaty, alienate the public domain, and how?*—166.

There can be no doubt, that the power competent to bind the nation by treaty, may alienate the public domain and property by treaty. The power that is intrusted generally, and largely, with the authority to make valid treaties of peace, can, of course, bind the nation by alienation of part of its territory: and this is equally the case, whether that territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private.

21. *When is a treaty of peace valid and binding on the nation?*—167.

When made with the present ruling power of the nation,

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or the government *de facto*. Other nations are to look only to the fact of possession of the supreme authority.

22. *Are defensive allies included in the pacification?*—167.

They are. The principal party, in whose name the war is made, can not justly make peace without including those defensive allies in the pacification who have afforded assistance, though they may not have acted as principals. The ally is, however, to be no further a party to the stipulations and obligations of the treaty, than he has been willing to consent. All that the principal can require is, that his ally be considered as restored to a state of peace.

23. *When must allies treat for peace in concert?*—167.

Every alliance, in which all the parties are principals in the war, obliges the allies to treat in concert, though each one makes a separate treaty of peace for himself.

24. *What is the effect of a treaty of peace?*—168.

It puts an end to the war, and abolishes the subject of it. Peace relates to the war which it terminates. It is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war.

25. *What does it forbid?*—168.

It forbids the revival of the same war, by taking arms for the cause which at first kindled it, though it is no objection to any subsequent pretensions to the same thing on other foundations.

26. *What if an abstract right be in question between the parties, and they make peace without taking notice of the question?*—168, 169.

It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself.

27. *What if nothing be said in the treaty about the conquered country or places?*—169.

They remain with the possessor, and his title can not afterward be called in question.

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28. *During war, what title has the conqueror to the territory he has subdued?*—169.

Only a usufructuary title; and the latest rights and title of the former sovereign continue, until a treaty of peace, by its silence, or by express stipulation, shall have extinguished his title for ever.

29. *How does peace affect debts existing, and injuries committed, prior to the war, but which made no part of the reasons for undertaking it?*—169.

They remain entire, and the remedies are revived.

30. *From what time do treaties bind the contracting parties?*—169.

From the moment of their conclusion, and that is understood to be from the day they are signed. A treaty made by the minister abroad, when ratified by his sovereign, relates back to the time of signing.

31. *What is the effect of acts of hostility committed subsequent to the date of the treaty?*—170.

They can not affect the subjects of the nation with guilt, provided they were committed before the treaty was known.

32. *What only can be required in such case?*—170.

That the government make immediate restitution of things captured after the cessation of hostilities.

33. *Are individuals responsible* civiliter *for acts of hostility committed subsequent to the date of the treaty, but before it was known?*—170, 171.

The better opinion was, that though such an act be done through ignorance of the cessation of hostilities, yet, mere ignorance of that fact would not protect the aggressor from civil responsibility in a prize court; and that if he acted through ignorance, his own government must protect and save him harmless. The decisions, however, are conflicting on the subject.

34. *If a time be fixed by treaty for hostilities to cease in a given place, what if a capture be previously made, but with knowledge of the peace?*—171, 172.

It has been a question among the writers on public law,

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whether the captured property should be restored. The better, and the more reasonable opinion is, that the capture would be null, in such case, though made before the day limited, provided the captor was previously informed of the peace.

35. *What is the obligation of treaties?*—175.

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals.

36. *How are treaties to be construed?*—175.

They are to receive a fair and liberal interpretation, according to the intention of the contracting parties. Their meaning is to be ascertained by the same rules of construction, and course of reasoning, which we apply to the interpretation of private contracts.

37. *If a treaty should, in fact, be violated by one of the contracting parties, with whom alone does it rest to pronounce it broken?*—175.

With the injured party. The treaty, in such a case, is not absolutely void, but voidable at the election of the injured party. If he chooses not to come to a rupture, the treaty remains obligatory.

38. *What is the difference between a new war for some new cause, and a breach of a treaty of peace?*—175.

In the former case, the rights acquired by the treaty subsist notwithstanding the new war; but in the latter case, they are annulled by the breach of the treaty of peace, on which they are founded.

39. *What is the effect of a violation of any one article of a treaty?*—175.

It is a violation of the whole treaty.

40. *Why is this?*—175.

All the articles of a treaty are dependent on each other; and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty, if the injured party elects so to consider it.

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41. *How may such effect be prevented?*—175.

By an express provision in the treaty, that if one article be broken, the others shall, nevertheless, continue in full force.

42. *What if a treaty contains stipulations which contemplate a state of future war, and make provision for such an exigency?*—176.

Such stipulations preserve their force and obligation when the rupture takes place.

43. *Is the doctrine universally true, that treaties become extinguished,* ipso facto, *by war, unless revived by an express or implied renewal on the return of peace?*—176.

It is not. When treaties contemplate a permanent arrangement of national rights, or, by their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.

44. *How long does the national character of the place agreed to be surrendered by treaty, continue?*—177.

It continues as it was under the character of the ceding country, until it be actually transferred. Full sovereignty can not be held to have passed by the mere words of the treaty, without actual delivery.

45. *Does the release of a territory from the dominion and sovereignty of the country, if the cession be the result of coercion or conquest, impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession?*—178.

It does not.

46. *Why is this?*—179.

No government can be supposed to be able, consistently with the welfare of the whole community, and it is, therefore, not required, to assume the burden of losses produced by conquest, or the violent dismemberment of the state. It would be incompatible with the fundamental principles of the social compact.

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LECTURE IX.

OF OFFENSES AGAINST THE LAW OF NATIONS.

1. *Why is the violation of a treaty of peace, or other national compact, a violation of the law of nations?*—181.

Because it is a breach of public faith.

2. *What offenses fall more immediately under the cognizance of the law of nations?*—182.

The violations of safe conducts, infringements of the rights of ambassadors, and piracy. To these we may add the slave trade, which may now be considered, not, indeed, as a piratical trade, absolutely unlawful by the law of nations, but as a trade condemned by the general principles of justice and humanity, openly professed and declared by the powers of Europe.

3. *What does a safe conduct or passport contain?*—182.

A pledge of the public faith, that it shall be duly respected.

4. *What has the statute law of the United States provided as to the violation of safe conduct?*—182.

That if any person shall violate any safe conduct or passport, granted under the authority of the United States, he shall, on conviction, be imprisoned not exceeding three years, and fined at the discretion of the court.*

5. *What is piracy?*—183.

Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land.

6. *How are pirates punished?*—184.

They are everywhere pursued and punished with death. Every nation has a right to attack and exterminate them without any declaration of war.

7. *What has Congress declared as to piracy?*—184, 185.

That murder or robbery, committed on the high seas, or in

* Act of Congress of April 30th, 1790, sec. 27.

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any river, haven, or bay, out of the jurisdiction of any particular State, or any other offense which, if committed within the body of a country, would, by the laws of the United States, be punishable with death, should be adjudged to be piracy and felony, and punishable with death. That if any captain or mariner should piratically and feloniously run away with any vessel, or any goods or merchandise to the value of fifty dollars; or should yield up any such vessel voluntarily to pirates; or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make a revolt in the ship; every such offender should be adjudged a pirate and felon, and be punishable with death. That accessaries to such piracies before the fact are punishable in like manner; but accessaries after the fact are punishable only by fine and imprisonment. That if any person, upon the high seas, or in any open roadstead, or bay, or river, where the sea ebbs and flows, commits the crime of robbery in and upon any vessel, or the lading thereof, or the crew, he shall be adjudged a pirate. And that if any person engaged in any piratical enterprise, or belonging to the crew of any piratical vessel, should land and commit robbery on shore, such an offender shall also be adjudged a pirate.*

8. *Is it sufficient to refer to the law of nations for a definition of piracy?*—186.

It is so held by the Supreme Court. Robbery on the high seas is, therefore, piracy by the Act of Congress, as well as by the law of nations.

9. *Is it, for the purpose of giving jurisdiction, of any importance on* whom *or* where *a piratical offense has been committed?*—186.

It is not. A pirate, who is one by the law of nations, may be tried and punished in any country where he may be found.

10. *Of what effect is the plea of* autrefois acquit, *resting on a prosecution instituted in the courts of any civilized State, beyond such State?*—188.

It would be a good plea in any other civilized State.

* Act of April 30th, 1790, c. 9, sec. 8.

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11. *Can an alien, under the sanction of a national commission, commit piracy while he pursues his authority?*—188.

He can not. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy.

12. *What if a natural born subject was to take prizes belonging to his native country, in pursuance of a foreign commission?*—191.

He would, on general principles, be protected by his commission from the charge of piracy.

13. *What have the United States done to prevent the mischief of such conduct?*—191.

They have followed the provisions of the English statute, and the general practice of other nations, and have, by the Act of Congress of April 30th, 1790, sec. 9, declared that if any citizen should commit any act of hostility against the United States or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or State,* or on pretense of authority from any person, such offender shall be adjudged to be a pirate, felon and robber, and on being thereof convicted, shall suffer death.

14. *For what aggressions, upon the high seas, does the Act of Congress authorize a capture and condemnation, in the courts of the United States?*—191.

For all piratical aggressions by foreign vessels. All such hostile and criminal aggressions on the high seas, under the flag of any power, render property taken *in delicto* subject to confiscation by the law of nations.

15. *How far is the African slave trade regarded as an offense?*—191, 192.

It is an offense against the municipal laws of most nations in Europe, and it is declared to be piracy by the statute laws of England and the United States.

16. *Is it to be considered as an offense against the law of nations, independent of compact?*—192.

This has been a grave question, much litigated in the courts charged with the administration of public law.

* A STATE, in the meaning of public law, is a complete or self-sufficient body of persons, united together in one community, for the defense of their rights, and to do right to foreigners.

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17. *What is the doctrine of the English cases on this head?*—198, 200.

That the slave trade, abstractly speaking, is immoral and unjust; and it is illegal, when declared so by treaty or municipal law. But it is not piratical or illegal by the common law of nations, because, if it were so, every claim founded on the trade would at once be rejected everywhere and in every court on that ground alone. That the British statutes against the slave trade were only applicable to British subjects, and only rendered the trade unlawful when carried on by them.

18. *What has been finally decided, as to the question, in this country?*—200.

The Supreme Court, in a case before it,* declared that the slave trade, though contrary to the law of nations, had been sanctioned, in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered as contrary to the law of nations, which had been authorized and protected by the usages and laws of all commercial nations. It was not piracy, except so far as it was made so by the treaties or statutes of the nation to which the party belonged. It might still be lawfully carried on by the subjects of these nations who have not prohibited it by municipal acts or treaties.

19. *What have the United States prescribed by statute, against the slave trade?*—193, 194.

The Constitution of the United States laid the foundation of a series of provisions, to put a final stop to the progress of this great moral pestilence, by admitting a power in Congress to prohibit the importation of slaves after the expiration of the year 1807.

Prior to that time Congress did all on that subject that it was within their competence to do. By the acts of March 22d, 1794, and May 10th, 1800, the citizens of the United States, and residents within them, were prohibited from engaging in the transportation of slaves from the United States to any foreign place or country, or from one foreign place or country to another, for the purpose of traffic.

By the act of March 2d, 1807, it was prohibited, under

* The Antelope, 10 Wheat, R., 66.

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severe penalties, to import slaves into the United States after January 1st, 1808; and on April 20th, 1818, the penalties and punishments were increased, and the prohibition extended not only to importation, but generally against any citizen of the United States being concerned in the slave trade. The act of March 3d, 1819, went a step further, and authorized national armed vessels to be sent to the coast of Africa, to stop the slave trade, so far as citizens or residents of the United States were engaged in the trade; and their vessels and effects were made liable to seizure and confiscation.

The act of May 15th, 1820, went still further, and declared that if any citizen of the United States, being of the crew of a foreign vessel, engaged in the slave trade,[2] or any person whatever being of the crew of any vessel owned in whole or in part, or navigated for or on behalf of any citizen of the United States, should land on any foreign shore, and seize any negro or mulatto not held to service or labor by the laws of either of the States or Territories of the United States, with intent to make him a slave; or should decoy, or forcibly bring or receive such person on board such vessel, with like intent;[4] or should forcibly confine or detain on board any negro or mulatto, not lawfully held to service, with intent to make him a slave;[5] or should on board any such vessel offer to sell as a slave any negro or mulatto, not held to service as aforesaid;[6] or should, on the high seas, or on any tide water, transfer or deliver over, to any other vessel, any such negro or mulatto, with intent to make him a slave, or should deliver on shore, from on board any such vessel, any negro or mulatto, with like intent, such citizen or person should be adjudged a pirate, and, on conviction, should suffer death.*

20. *How far does the statute operate?*—194.

It operates only when our municipal jurisdiction might be applied, consistently with the general theory of public law, to the persons of our citizens, or to foreigners on board of American vessels.

* These Acts of Congress apply exclusively to external commerce in slaves. The *internal* commerce, within the United States, in slaves, is left to the control and discretion of the State governments. The northern States, which have abolished slavery, admit of no internal commerce in slaves within their respective States.

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LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

1. *How and for what purpose was the government of the United States erected?*—201.

It was erected by the free voice and joint will of the people of America, for their common defense and general welfare.

2. *To what do its powers apply?*—201.

They apply to those great interests which relate to this country in its national capacity, and which depend, for their stability and protection, on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness.

3. *When did the association of the American people into one body politic take place?*—201.

While they were colonies of the British empire, and owed allegiance to the British crown.

4. *What early confederacy may be considered the foundation of a series of efforts for a more extensive and more perfect union of the colonies?*—202.

That of the New England colonies in 1643.

5. *After the dissolution of this earliest league, what other precedents are there of association of the people of this country for their safety?*—203–208.

There are other instructive precedents: a congress of governors and commissioners from other colonies, as well as from New England, was occasionally held, to make arrangements for the more effectual protection of an interior frontier, and we have an instance of one of these assemblies at Albany, in 1722. But a much more interesting Congress was held in the year 1754, which consisted of commissioners from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania

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and Maryland, and was called at the instance of the lords commissioners for trade and the plantations, to take into consideration the best means of defending America, in case of war with France, which was then impending. The object of the English administration in calling this convention, was in reference to the treaties of friendship with the Indian tribes; but the colonies had more enlarged views. One of the colonies (Massachusetts) expressly instructed her delegates to enter into articles of union and confederation with the other colonies, for their general security in peace as well as in war. The convention unanimously resolved that a union of the colonies was absolutely necessary for their preservation.

Soon after the unfriendly attempt upon our chartered privileges, by the statute for raising a revenue in the colonies by means of a stamp duty, a congress of delegates from nine colonies was assembled in New York, in October, 1765, upon the recommendation of Massachusetts, and they digested a bill of rights, in which the sole power of taxation was declared to reside in their own colonial legislatures.

This was preparatory to a more extensive and general association of the colonies, which took place in September, 1774, and laid the foundations of our independence and permanent glory. This, the first Continental Congress, whose names and proceedings are still familiar to the present age, took into consideration the afflicted state of their country; asserted, by a number of declaratory resolutions, what they deemed to be the inalienable rights of English freemen;* pointed out to their constituents the system of violence which was preparing against those rights; and bound them by the most sacred of all ties, the ties of honor and of their country, to renounce commerce with Great Britain, as being the most salutary means to avert that violence and to secure those rights. These resolutions received prompt and universal obedience, and the union, being thus auspiciously formed, was continued by a succession of delegates in Congress.

* The most material of these declaratory resolutions was the one which stated that, as the colonies were not and could not properly be represented in the British Parliament, they were entitled "to a free and exclusive power of legislation in their several provincial legislatures in all cases of taxation and internal polity, subject only to the negative of their sovereign."

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6. *When was the confederacy of the thirteen colonies completed?*—208.

By the accession of Georgia, in 1775.

7. *Were articles of confederation adopted?*—210, 211.

On the 11th of June, 1776, Congress undertook to digest and prepare articles of confederation.* It was not until the 11th of November, 1777, that they could so far unite the discordant interests and prejudices of thirteen distinct communities, as to agree to these articles. Most of the legislatures ratified them promptly; but Delaware did not accede to them until the year 1779. Maryland at first explicitly rejected them, but assented to them on the 1st of March, 1781, upward of three years from their first promulgation; and thus the articles of confederation received the unanimous approbation of the United States.†

8. *When, and by whom, was the Constitution of the United States formed?*—218, 219.

By the general convention of 1787,‡ composed of delegates from all the States, except Rhode Island, assembled at Philadelphia. After several months of tranquil deliberation, that convention agreed on the plan of government which now forms the Constitution of the United States.

9. *When was government organized under that Constitution?*—219.

On the 4th of March, 1789, the government was duly organized and put into operation under it.

* The instructions given to the delegates to the Continental Congress, by the several colonial congresses, conventions and assemblies, in 1776, and prior to the declaration of independence, contained an express reservation to each colony of the sole and exclusive regulation of its own internal government, police and concerns.

† The government of the Union is considered to have been revolutionary in its nature, from its first institution by the people of the colonies, in 1774, down to the first ratification of the articles of confederation, in 1781, and to have possessed powers adequate to every national emergency, and coëxtensive with the object to be obtained. Story's Com. on the Constitution, vol. i., pp. 186–191.

‡ Though the proximate origin of the federal convention of 1787 was the proposition from Virginia, in 1786, yet the necessity of a national convention, with full authority to amend and reorganize the government, was first suggested, and fully shown, by Colonel Hamilton, in 1780, while he was an aid to General Washington, in his masterly letter to James Duane, a member of the then Congress from New York.

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10. *When had the Constitution received the unanimous ratification of the respective conventions of the people in every State?*—219.

In June, 1790.

LECTURE XI.

OF CONGRESS.

1. *What are the constituent parts of Congress?*—222.

Congress consists of a Senate and House of Representatives.

2. *What is one chief object of this separation of the Legislature into two Houses, acting separately, and with coördinate powers?*—222.

To destroy the evil effects of sudden and strong excitement, and of precipitate measures, springing from passion, caprice, prejudice, personal influence and party intrigue, which have been found, by sad experience, to exercise a potent and dangerous sway in single assemblies.*

3. *How is the Senate of the United States composed?*—224, 225.

It is composed of two senators from each State, chosen by the Legislature thereof, for six years, and each senator has one vote.

4. *If vacancies in the Senate happen by resignation, or otherwise, how are they filled?*—225.

If they happen during the recess of the Legislature of any State, the Executive thereof may make temporary appointments, until the next meeting of the Legislature, which shall fill such vacancies.†

* Adams's Defense of the American Constitution, vol. iii., p. 502.

† The Executive must wait until the vacancy has actually occurred, before he can constitutionally appoint. This was settled by the Senate of the United States, in 1825.

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5. *What qualifications are requisite in a senator?*—228.

The Constitution requires that each senator shall be thirty years of age, and nine years a citizen of the United States, and, at the time of his election, an inhabitant of the State for which he is chosen.

6. *How is the House of Representatives composed?*—228.

It is composed of members chosen every second year by the people of the several States, who are qualified electors of the most numerous branch of the Legislature of the State to which they belong.*

7. *What are the requisite qualifications of a representative?*—228, 229.

No person can be a representative until he has attained the age of twenty-five years, and who has not been seven years a citizen of the United States, and who is not, at the time of his election, an inhabitant of the State in which he is chosen. But the Constitution requires no evidence of property in the representative, nor any declaration of religious belief. He is only required to be a citizen of the requisite age, and free from any undue bias or dependence, by not holding any office under the United States.

8. *How are the representatives directed to be apportioned among the States?*—230.

According to numbers, which is determined by adding to the whole number of free persons, including those bound to service for a term of years, and exclusive of Indians not taxed, three fifths of all other persons. The number of representatives can not exceed one for every thirty thousand, but each State is entitled to have at least one representative. The actual enumeration or census of the inhabitants of the United States is to be made every ten years,† and the representatives newly apportioned upon the same, under a new ratio, according to the relative increase of the population of the States.

* In almost all the States no property qualification whatever, not even paying taxes, or serving in the militia, or being assessed for and working on the public highway, is requisite for the exercise of the rights of suffrage.

† By the census completed in 1851, the number of inhabitants in the United States was 23,191,876. By the Act of May 23d, 1850, two hundred and thirty-three representatives are appointed among the States.

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9. *To what objection is this rule of apportionment exposed?*—230

To the objection that three fifths of the slaves in the southern States are computed in establishing the apportionment of the representation. But the rule was the result of necessity, and grew out of the fact of the existence of domestic slavery in a portion of our country.

10. *May the United States, in their improvements upon the exercise of the rights of representation, claim prëminence over other governments, ancient and modern?*—231.

They may. Our elections are held at stated seasons, established by law. The people generally vote by ballot,* in small districts, and public officers preside over the elections, and receive the votes, and maintain order and fairness.

11. *What are the privileges of the two Houses of Congress?*—234.

Each House is made the sole judge of the election, return and qualifications of its members. A majority of each House constitutes a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide. Each House, likewise, determines the rules of its proceedings, and can punish its members for disorderly behavior; and, with concurrence of two thirds, expel a member. Each House is likewise bound to keep a journal of its proceedings, and, from time to time, publish such parts as do not require secresy, and to enter the yeas and nays on the journal, on any question, when desired by one fifth of the members present. The members of both Houses are likewise privileged from arrest during their attendance on Congress, and in going to and returning† from the same, except in cases of treason, felony, and breach of the peace. No member can be questioned out of the House for any speech or debate therein. There is no power expressly given

* Voting by ballot was introduced into the province of Massachusetts, in 1634. In New York, the people voted *viva voce*, until after the Revolution, and then voting by ballot was constitutionally established. Elections in Virginia and Kentucky are still *viva voce*, and not by ballot, and this method is established by the existing constitutions of these States.

† This privilege is confined to the members, and does not extend to their servants; and it applies as well to arrests on execution as to arrests on mesne process.

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to either House of Congress to punish for contempts, except when committed by their own members; but the Supreme Court has decided that they had that power, and that it was an implied power, and of vital importance to their safety, character and dignity.*

12. *What exclusive rights has the House of Representatives?*—236.

That of originating all bills for raising revenue.

13. *To what subjects do the powers of Congress extend?*—236.

Generally to all subjects of a national nature.

14. *For what was the qualified negative of the President, upon the formation of laws, principally intended?*—240.

To give to him a constitutional weapon to defend the executive department, as well as the just balance of the Constitution, against the usurpations of the legislative power.

LECTURE XII.

OF JUDICIAL CONSTRUCTIONS OF THE POWERS OF CONGRESS.

1. *What judicial constructions are there of the acts of Congress declaring that the United States were entitled to priority of payment over private creditors in cases of insolvency, and in the distribution of the estates of deceased debtors?*—243, 247.†

The Supreme Court has decided‡ that the acts of Congress,

* 6 Wheaton's R., 204.

† As to the rules of interpretation applicable to the Constitution, the instrument itself furnishes essentially the means of its own interpretation. It is, at the same time, just and true, that "the most unexceptionable source of *collateral* interpretation is from the practical exposition of the government itself, in its various departments, upon particular questions discussed, and settled upon their own intrinsic merits." In the questions and answers founded upon this lecture, however, we confine ourselves to "judicial constructions."

‡ *Fisher* v. *Blight*, 2 Cranch's R., 358.

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giving that general priority to the United States, were constitutional. It was a power founded on the authority to make all laws which should be necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States. Where the end was within the lawful powers of the government, Congress possessed the choice of the means, and was empowered to use any means which were in fact conducive to the exercise of the powers granted. The government is to pay the debts of the Union, and must be authorized to use the means most eligible to effect that object. It has a right to make remittances by bills or otherwise, and to take those precautions which will render these transactions safe. The principle settled was, that the United States are entitled to secure themselves the exclusive privilege of being preferred as creditors to private citizens and even to State authorities, in all cases of the insolvency or bankruptcy of their debtor. It was, however, subsequently held,* that the priority, to which the United States were entitled, did not partake of the character of a lien on the property of public debtors. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, had made a voluntary assignment of all his property, or having absconded or absented himself, his property had been attached by process of law. A *bona fide* conveyance of part of the property of the debtor, not for the fraudulent purpose of evading the law, but to secure a fair creditor, is not a case within the act of Congress giving priority.

Afterwards, it was held† that, in the distribution of a bankrupt's effects, the United States were entitled to their preference, although the debt was contracted by a foreigner in a foreign country, and the United States had proved their debt under a commission of bankruptcy. Though the law of the place where the contract is made be, generally speaking, the law of the contract, yet the right of priority forms no part of the contract. The insolvency which was to entitle the United States to a preference was declared‡ to mean a legal and known insolvency,

* *United States* v. *Hooe*, 3 Cranch's R., 73.

† *Harrison* v. *Sterry*, 5 Cranch's R., 289.

‡ *Prince* v. *Bartlett*, 8 Cranch's R., 431, *United States* v. *Canal Bank*, 3 Story's R., 79.

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manifested by some notorious act of the debtor, pursuant to law. Nor will the lien of a judgment creditor, duly perfected, be displaced by mere priority of the United States.* The word insolvency in the acts of Congress of 1790, 1797, and 1799, means a legal insolvency; and a mere state of insolvency, or inability in a debtor to pay all his debts, gives no right of preference to the United States, unless it be accompanied by a voluntary assignment of all his property for the benefit of creditors, or by some legal act of insolvency.

2. *In what cases, according to those decisions, have the United States a preference as creditors, to the extent therein declared?*—247.

In four cases: 1. In the case of the death of the debtor without sufficient assets; 2. Bankruptcy, or legal insolvency, manifested by some act pursuant to law; 3. A voluntary assignment by the insolvent of all his property to pay his debts; 4. In the case of an absent, concealed, or absconding debtor, whose effects are attached by process of law.

3. *What has been held as to the fiscal lien of the United States?*—248.

It was held† that the government had a lien on goods imported, for the payment of duties accruing on them; and not secured by bond; and that the United States were entitled to the custody of the goods until the duties were paid or secured, and any attachment of the goods under State process, during such custody, was void. On the other hand, it was held that the government had no general lien on the goods of the importer, for duties due by him upon other importations.

4. *What judicial construction is there as to the implied power of Congress to incorporate a bank?*—248–254.

It was held that the law creating the Bank of the United States was one made in pursuance of the Constitution; and that the branches of the National Bank, proceeding from the same stock and being conducive to the complete accomplishment of

* *United States* v. *Canal Bank*, 3 Story's R., 79.

† *Harris* v. *Dennie*, 3 Peters's U. S. R., 292.

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the object, were equally constitutional.* The Supreme Court was afterwards led in some degree to review this decision, and to admit that Congress could not create a corporation for its own sake or for private purposes.† The whole opinion in the case of *McCulloch* v. *The State of Maryland* was founded on, and sustained by, the idea, that the bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government. It was created for national purposes only, though it was undoubtedly capable of transacting private as well as public business.

5. What construction has been given to the powers of Congress relative to taxation?—255–257.

It was decided‡ by the Supreme Court that a general power was given to Congress to lay and collect taxes of every kind and nature, without any restraint. That they had plenary power over every species of taxable property except exports. But there were two rules prescribed for their government: the rule of uniformity and the rule of apportionment. Three kinds of taxes, viz., duties, imposts and excises, were to be laid by the first rule; and capitation, and other direct taxes, by the second rule. The Court subsequently held§ that Congress are not bound to, though they may in their discretion, extend a direct tax to all the Territories as well as to the States. A direct tax, if laid at all, must be laid on every State conformably to the census, and therefore Congress have no power to exempt any State from its due share of the burden. But it was understood that Congress were under no necessity of extending a tax to the unrepresented District of Columbia, and to the Territories; though if they be taxed, then the Constitution gives the rule of assessment.

6. What is decided as to the national right of domain?—257, 258.

That Congress have the exclusive right of preëmption to all

* *McCulloch* v. *The State of Maryland*, 4 Wheat. R., 316.
† *Osborn* v. *The United States*, 9 Wheat. R., 859, 860.
‡ *Hylton* v. *The United States*, 3 Dal. R., 171.
§ *Loughborough* v. *Blake*, 5 Wheat. R., 317.

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Indian lands lying within the territories of the United States. The United States own the soil, as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual States; and the Indians have only a right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy either by conquest or purchase.*

7. *Upon what was founded the title of Great Britain, France and Spain, which passed to the United States?*—258.

Upon discovery and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory rights of the natives, and which occupancy was all the right that European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country.

8. *How arose the title of the United States to the unpatented lands within the States of Ohio, Indiana, Illinois, Michigan, and the Territory of Wisconsin?*—259.

By cessions from the States of Virginia, Massachusetts, Connecticut and New York, before the adoption of the present Constitution of the United States.

9. *Were such cessions made by any other States?*—259.

Yes; North Carolina, South Carolina and Georgia made similar cessions of their unpatented lands, and which now compose the States of Tennessee, Alabama and Mississippi.

* *Johnson* v. *McIntosh*, 8 Wheat. R., 543; *Fletcher* v. *Peck*, 6 Cranch's R., 142-143

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10. *How were the lands thus ceded regarded?*—259.

They were intended to be, and were considered, as constituting a common fund for the benefit of the Union; and when the States in which the lands are situated were admitted into the Union, the proprietary right of the United States to these unimproved and unsold lands was recognized.

11. *Has the title of the United States to the unappropriated lands, lying within the limits of the separate States, been seriously questioned?*—259.

It has, by some of the States, as by Mississippi, Illinois and Indiana.

12. *Wherefore, and upon what oasis, were the cessions of the territorial claims of the separate States to the western country made?*—259.

They were called for by the resolutions of Congress of the 6th September and 10th October, 1780, and were made upon the basis that they were to be "disposed of for the common benefit of the United States."*

13. *What was stipulated upon the subject by Congress?*—259.

Not only that the lands to be ceded should be disposed of for the common benefit, but that they should be settled and formed into distinct republican States, with a suitable extent of territory, become members of the American Union, and have the same rights of sovereignty, freedom, and independence, as the other States.

14. *What was provided by the ordinance of July 13th, 1787, for the government of the territory of the United States north-west of the Ohio river?*—260.

That the legislatures of the districts, or new States to be erected therein, should "never interfere with the primary disposal of the soil by the United States, in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchaser."

* Journals of Continental Congress.

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15. *What effect is given to the public acts, records and judicial proceedings of every State in every other State?*—260.

In pursuance of the Constitution, Congress, by the act of May 26th, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared that they should have such faith and credit given to them in every court within the United States, as they had by law or usage in the courts of the State from whence the records were taken. Under this act it has been decided* that if a judgment, duly authenticated, had, in the State court from whence it was taken, the faith and credit of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. A judgment is, therefore, conclusive in every other State, if a court of the particular State where it was rendered would hold it conclusive.†

16. *What power have Congress over the militia?*—262.

Congress have authority to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress. The President of the United States is to be the commander of the militia, when called into actual service.

17. *To whom does it belong to judge when the exigency arises in*

* *Mills v. Duryee*, 7 Cranch's R., 481.

† But the defendant must have had due notice to appear, or be subject to the jurisdiction of the court, or, if a foreigner or non-resident, he must have actually appeared to the suit, or the judgment of another State will not be deemed of any validity. The notice must be such as the State giving it is competent to direct; mere knowledge of the pendency of the suit is not sufficient. The doctrine in *Mill* v. *Duryee* (7 Cranch, 481) is to be taken with the qualification, that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. The court must have had jurisdiction, not only of *the cause*, but of *the parties*, and in that case the judgment is final and conclusive.

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which the President has authority, under the Constitution, to call forth the militia?—265.

The Supreme Court has decided and settled* that it belongs exclusively to the President to judge when the exigency arises, in which he has authority under the Constitution to call forth the militia, and that his discretion is conclusive upon all other persons.

18. *When are militia, called into the service of the United States, not to be considered as national militia?*—266.

The Supreme Court decided† that the militia, when called into the service of the United States, were not to be considered as being in that service, or in the character of national militia, until they were mustered at the place of rendezvous, and that until then, the State retained a right, concurrent with the government of the United States, to punish their delinquency.

19. *Has the authority of Congress to appropriate public moneys for internal improvements been brought under judicial consideration?*—267.

The point has been much discussed on public occasions, and between the legislative and executive branches of the government; but it has never been brought under judicial consideration.

LECTURE XIII.

OF THE PRESIDENT.

1. *In whom is the executive power of the United States vested?*—271.

It is ordained by the Constitution that the executive power shall be vested in a President.‡

* *Martin* v. *Mott*, 12 Wheat. R., 19.

† *Houston* v. *Moore*, 5 Wheat. R., 1.

‡ The executive branch of the government of the United States is organized under

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2. *What personal qualifications must the President possess?* —273.

The Constitution requires that he shall be a natural-born citizen of the United States, or a citizen at the time of the adoption of the Constitution, and that he shall have attained the age of thirty-five years, and shall have been fourteen years a resident within the United States.

3. *In what manner is the President elected?*—275.

The Constitution has referred the election of a President to a small body of electors, appointed in each State under the direction of the Legislature, and has declared that Congress may determine the time of choosing the electors, and the day on which they shall vote, and that the day of election shall be the same in every State. And Congress has directed that the electors be appointed in each State within thirty-four days of the day of election. The number of electors in each State is directed by the Constitution to be equal to the whole number of senators and representatives which the State is entitled to send to Congress. These electors meet in their respective States, at a place appointed by the Legislature thereof, on the first Wednesday in December, in every fourth year succeeding the last election, and vote by ballot for President and Vice-President. They name in their ballots the person voted for as President, and, in distinct ballots, the person voted for as Vice-President; and they make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they sign, and certify, and transmit, sealed, to the seat of government of the United States, directed to the President of the Senate. The votes must be delivered to the President of the Senate before the first Wednesday of January next ensuing the day of election. The President of the Senate, on the second Wednesday of February succeeding every meeting of the electors, in the presence of both Houses of Congress, opens all the certificates, and the votes are then to be counted.

six Departments, viz., the State Department, the Treasury Department, the War Department, the Navy Department, the Post Office Department, and the Department of the Interior; at the head of each of which there is a Secretary, appointed by the President, by and with the advice and consent of the Senate, but subject to removal by the President alone.

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The President of the Senate counts the votes.* The person having the greatest number of votes of the electors for President, is President, if such number be a majority of the whole number of electors appointed; but if no person have such majority, then, from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation of each State having one vote. A quorum for this purpose consists of a member or members from two thirds of the States, and a majority of all the States is necessary to a choice. The person having the greatest number of votes as Vice-President, is Vice-President, if such number be a majority of the whole number of the electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President.

If the House of Representatives do not make a choice of President, when the right of choice devolves upon them, before the fourth day of March next following, then the Vice-President acts as President, as in the case of the death or constitutional disability of the President. A quorum for the purpose of electing a Vice-President consists of two thirds of the whole number of senators, and a majority of the whole number is necessary to a choice, and no person constitutionally ineligible to the office of President is eligible to that of Vice-President.

4. *For how many years is the President elected to office?*—278, 280.

The President and Vice-President both hold office for a

* In determining the result of the election for President in 1841, it was declared, by joint resolution of the two Houses of Congress, that one person be appointed teller on the part of the Senate, and two on the part of the House of Representatives, who were, in the presence of the two Houses, to make a list of the votes as they should be declared, and the result declared to the President of the Senate, who was to be the presiding officer, and to announce to both Houses the state of the vote and the persons elected. The Vice-President, in that case, broke the seals of the envelopes of the votes, and delivered the same over to the tellers to be counted. The tellers having read, counted, and made duplicate lists of the votes, they were delivered over to the Vice-President and read, and he then declared the result and dissolved the joint meeting of the two Houses.

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term of four years, and it is provided by act of Congress that this term shall in all cases commence on the fourth day of March next succeeding the day on which the votes shall have been given. The President is reëligible for successive terms, but in practice no President has ever consented to be a candidate for a third election, and this seems to have established by usage, and in accordance with public opinion, a limitation to his capacity of continuance in office.

5. *Does the Vice-President ever act as President?*—278.

Yes; in case of removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the office, the same devolve on the Vice-President; and except in cases in which the President is enabled to reassume the office, the Vice-President acts as President during the remainder of the term for which the President was elected. Congress are authorized to provide for the case of removal, death, inability or resignation of both President and Vice-President, declaring who should then act as President; and the person so designated is to act until the disability be removed, or a President shall be elected, and who is in that case to be elected on the first Wednesday of the ensuing December, if time will admit of it, and if not, then on the same day in the ensuing year. In pursuance of this constitutional provision, Congress, in the year 1792, enacted that in case of vacancy in the office both of President and Vice-President, the President of the Senate *pro tem.*, and in case there should be no President of the Senate, then the Speaker of the House of Representatives for the time being, should act as President until the vacancy was supplied.

6. *Is the President a salaried officer?*—281.

Yes; the Constitution declares that he shall, at stated times, receive for his services a compensation that shall neither be increased nor diminished, during the period for which he shall have been elected; and that he shall not receive, within that time, any other emolument from the United States, or any of them.

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7. *What are the powers of the President?*—282-288.

He is commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into actual service of the Union. The President has also power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. He has also the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The President is the efficient power in the appointment of the officers of the government. He is to nominate, and, with the advice and consent of the Senate, to appoint ambassadors, or public ministers and consuls, the judges of the Supreme Court, and all other officers whose appointments are not otherwise provided for in the Constitution; but Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of Departments. The remaining duties of the President consist in giving information to Congress of the state of the Union, and in recommending to their consideration such measures as he shall judge necessary or expedient. He is to convene both Houses of Congress, or either of them, on extraordinary occasions, and he may adjourn them in case of disagreement. He is to fill up all vacancies that may happen during the recess of the Senate; by granting commissions which shall expire at the end of their next session. He is to receive ambassadors and other public ministers (and this includes the power to dismiss them), to commission all the officers of the United States, and to take care that the laws be faithfully executed.

8. *How may the President be removed from office?*—289.

By impeachment. The President, Vice-President, and all civil officers of the United States, may be impeached by the House of Representatives, for treason, bribery, and other high crimes and misdemeanors, and, upon conviction by the Senate, removed from office.

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LECTURE XIV.

OF THE JUDICIARY DEPARTMENT.

1. *What power interferes more visibly and uniformly, than any other part of government, with all the interesting concerns of social life?*—290.

The judiciary power. Personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.

2. *Where has the Constitution vested the judicial power of the United States?*—290.

In one Supreme Court, and in such inferior courts as Congress may from time to time ordain.

3. *Had Congress any discretion in this matter?*—290.

No: they were bound to vest the whole judicial power, in an original or appellate form, in the courts mentioned and contemplated in the Constitution, and to provide courts inferior to the Supreme Court, in which the judicial power, unabsorbed by the Supreme Court, might be placed. The judicial power of the United States is, in point of origin and title, equal to the other powers of the government, and is as exclusively vested in the courts created by or in pursuance of the Constitution, as the legislative power is vested in Congress, or the executive in the President.

4. *For how long a term do the judges hold office?*—292.

The judges, both of the supreme and inferior courts, hold office during good behavior; and they are, at stated times, to receive for their services a compensation which shall not be diminished during their continuance in office.*

* By the Constitutions of Massachusetts, Delaware, Maryland, Virginia, Kentucky, North and South Carolina, Florida, and Missouri, judges of the Supreme Courts hold office during good behavior. By the Constitution of 1838, the Supreme Court judges of Pennsylvania hold office for fifteen years; those of Illinois, by the Constitution of 1848, for nine; and those of Louisiana, by the Constitution of 1845, for eight. In Maine, New Hampshire, and Connecticut, they hold during good behavior, or until

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5. *What is the extent of the judicial power?*—295, 296.

The judicial power is coëxtensive with the power of legislation. It extends to all cases in law and equity arising under the Constitution, the laws and treaties of the Union; to all cases

seventy years of age, and in Missouri until sixty-five. In Tennessee, the Supreme Court judges hold office for twelve years; in Arkansas, for eight; in New Jersey, Ohio, Michigan, and Indiana, for seven; in Alabama, Mississippi, and Texas, for six; and in Iowa, for four years. In Vermont they are annually elected, and in Georgia they hold office for a term of six years. By the Constitution of Rhode Island, adopted in 1842, the judges of the Supreme Court are elected by the Legislature, and hold till their places are declared vacant by a resolution passed by a majority of all the members elected to each House. In Mississippi, by the Constitution of 1833, the judges are elected by the people for a term of six years, and by the new Constitutions of Kentucky, Louisiana, Ohio, and Iowa, the judiciary is now elective. In all the other States (until recently) the judges of the higher courts of law and equity were appointed either by the Governor and Council, or Governor and Senate—as in Maine, Massachusetts, New Hampshire, New York, New Jersey, Maryland, Indiana, Missouri, and Michigan; or by the Governor alone, as in Pennsylvania and Delaware; or by the Legislature, as in Vermont, Rhode Island, Connecticut, Virginia, North and South Carolina, Georgia, Florida, Tennessee, Illinois, Alabama, and Arkansas. In Indiana, the judges of the Supreme Court are appointed by the Governor and Senate, the presidents of the Circuit Court by the Legislature, and the associate circuit judges are elected by the people. The Constitution of New York of 1845 ordained that there should be a Court of Appeals, composed of eight judges, of whom four are to be elected by the electors of the State for a term of eight years, and four selected from the class of justices of the Supreme Court having the shortest time to serve; and these justices were to be so classified that one should be elected every second year. There was to be a Supreme Court having general jurisdiction in law and equity. The State was to be divided into eight judicial districts, and to have four justices of the Supreme Court in each district, and to be so classified that one of the justices of each district shall go out of office at the end of every two years; and after the expiration of their terms under such classification, the term of their office shall be eight years. One or more of the justices of the Supreme Court, who is not a judge of the Court of Appeals, to be designated to preside at the general terms of the said courts to be held in the several districts, and any three or more of the said justices (the presiding justice so designated to be one) to hold such general terms. Any one or more of them may hold special terms and Circuit Courts, and preside in Courts of Oyer and Terminer in any county. The justices of the Supreme Court are elected by the electors of the several districts. The judges of the Court of Appeals and justices of the Supreme Court are not to hold any other office or public trust, nor exercise any power of appointment to public office, and may be removed by concurrent resolutions of two thirds of all the members elected to the Assembly, and a majority of all the members elected to the Senate. The clerk of the Court of Appeals is to be *ex officio* clerk of the Supreme Court, to be chosen by the electors of the State for a term of three years, and to be paid out of the public treasury. No judicial officer, except justices of the peace, shall receive any fees or perquisites of office.

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affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; to controversies between a State, when plaintiff, and the citizens of another State, or foreign citizens or subjects; to controversies between citizens of different States; and between citizens of the same State, claiming lands under grants of different States; and between a State, or citizens thereof, and foreign States, and ~~between~~ citizens and ~~foreigners~~. The judicial department of the United States is, in the last resort, the final expositor of the Constitution as to all questions of a judicial nature.*

6. *What amendment was made in regard to the judicial power in* 1794?—297.

It was declared by the amendment that the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State. The inhibition applies only to citizens or subjects, and does not extend to suits by a State, or foreign States or powers. They retain the capacity to sue a State as it was originally granted by the Constitution; and the Supreme Court has original jurisdiction in the case of suits by a foreign State against one of the members of the Union.

7. *Of how many judges does the Supreme Court consist?*—298.

Of one chief justice, and eight associate justices, any five of whom make a quorum; and it holds one term annually, at the seat of government, commencing on the first Monday in December, and continued at discretion.

8. *In what cases has the Supreme Court exclusive jurisdiction?* —298.

In all controversies of a civil nature, where a State is a party, except between a State as *defendant* and its citizens; and except, also, between a State as *defendant* and citizens of other States, or aliens, in which cases it has no jurisdiction; but in all

* 1 Story's Commentaries on the Constitution, 344–382.

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~~these cases where a State is *plaintiff*~~, it has original but not exclusive jurisdiction. It has also, exclusively, all such jurisdiction of suits, of proceedings against ambassadors, or other public ministers, or their domestics or servants, as a court of law can have ~~or exercise~~, consistently with the law of nations; an original, but not exclusive* jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. The Supreme Court was clothed by the Constitution "with appellate jurisdiction, both as to law and fact, with such exceptions and regulations as Congress should make."

9. *In what cases has the Supreme Court appellate jurisdiction?* —299.

By the judiciary act of 1789, appeals lie to this court from the Circuit Courts, and the courts of the several States. Final judgments and decrees, in civil actions ~~and suits in equity~~, in the Circuit Courts of the United States, whether brought by original process, or removed there from the State courts, or by appeal from the District Courts, in cases where the matter in dispute exceeds two thousand dollars, exclusive of costs, may be reëxamined, by writ of error, and reversed or affirmed, by the Supreme Court. And by act of Congress of May 31, 1844, the Supreme Court has appellate jurisdiction in revenue cases, without regard to the sum in dispute, provided the judgment appealed from was rendered in a Circuit Court of the United States. Final judgments and decrees in the Circuit Courts, in cases of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute exceeds two thousand dollars, exclusive of costs, may be reviewed on appeal in the Supreme Court.

So, also, a final judgment or decree, in any suit in the highest court of law or equity of a State, may be brought up on error in point of law to the Supreme Court of the United States, provided the validity of a treaty or statute of, or authority exercised under the United States was drawn in question in the State Court, and the decision was against that validity; or pro-

* See more at large on this point, the case of *United States* v. *Ortega*, 11 Wheaton 467, and cases there cited.

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vided the validity of any State authority was drawn in question, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of its validity; or provided the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States was drawn in question, and the decision was against the title, right, privilege or exemption, specially claimed under the authority of the Union.

10. *What other powers has the Supreme Court?*—300.

It has a superintending authority over the inferior courts, and has power to issue writs of prohibition and mandamus to them in certain cases; to grant writs of *ne exeat* and of injunction; to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary to the exercise of its proper jurisdiction, and agreeable to the principles and usages of that generally recognized and long-established law which forms the substratum of the laws of every State.

11. *In what cases have the Circuit Courts original jurisdiction?*—302, 303.

They have original cognizance, concurrent with the State courts, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds five hundred dollars, exclusive of costs, and the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. They have likewise exclusive cognizance, except in certain cases, of all crimes and offenses cognizable under the laws of the United States, exceeding the degree of ordinary misdemeanors, and of them they have concurrent jurisdiction with the District Courts. They have, also, original jurisdiction in equity and at law of all suits arising under the revenue laws of the United States, or under any law of the United States relative to copyrights and patent rights growing out of inventions and discoveries, and to protect such rights by injunction. The jurisdiction in the case of copyrights applies, without regard to the character of the parties, or the amount in dispute.

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12. *In what cases have the Circuit Courts appellate jurisdiction?*—302, 303.

From all final decrees and judgments in the Districts Courts, where the matter in dispute, exclusive of costs, exceeds fifty dollars. If the remedy be on final decrees in the District Courts, in cases of admiralty and maritime jurisdiction, and the matter in dispute exceeds three hundred dollars, it is by appeal; and if on final judgments in civil cases, it is by writ of error. And if any suit be commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, or against a citizen of the same State claiming lands under a grant from another State, and the matter in dispute exceeds five hundred dollars, exclusive of costs, the defendant, on giving security, may remove the cause to the next Circuit Court.

13. *In what cases have the District Courts jurisdiction?*—304.

They have, exclusive of the State courts, cognizance of all the lesser crimes and offenses cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, and which are punishable by fine not exceeding one hundred dollars, by imprisonment not exceeding six months, or when corporal punishment, not exceeding thirty stripes, is to be inflicted. They have also exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under impost, navigation, or trade laws of the United States, where the seizures are made upon the high seas, or on waters within their districts navigable from the sea with vessels of ten or more tons burden; and also of all seizures made under the laws of the United States; and also of all suits for penalties and forfeitures incurred under these laws. They have also cognizance, concurrent with the Circuit Courts and State Courts, of causes where an alien sues for a tort committed in violation of the law of nations, or a treaty of the United States; and of all suits at common law, in which the United States are plaintiffs, and the matter in dispute amounts, exclusive of costs, to two hundred dollars. They have jurisdiction, likewise, exclusive of the courts of the several States, of all

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suits against consuls or vice-consuls, except for offenses above the magnitude which has been mentioned. And by act of Congress of August 8th, 1846, they, in common with the Circuit Courts, have jurisdiction as justices of the peace against offenders against the United States. They have also cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of its coasts; and to repeal patents unduly obtained.

14. *What authority have the Superior Courts of the several Territories?*—305.

In those Territories in which there is no District Court established, they have the enlarged authority of the Circuit Courts, subject to revision by writ of error, and appeal to the Supreme Court. The district and territorial judges are required to reside within their respective jurisdictions, and no federal judge can act as counsel, or be engaged in the practice of the law.

LECTURE XV.

OF THE ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

1. *Whence does the United States government derive its powers, and what is the degree of subordination under which the State governments are constitutionally placed?*—313, 314.

From the Constitution of the United States, which is an instrument containing the grant of specific powers, and the government of the Union can not claim any powers beyond those contained in the grant, and which have been given either expressly or by necessary implication. All the powers vested in the State governments, or remaining with the people of the several States, prior to the establishment of the Constitution of the United States, continue unaltered and unimpaired, except so far as they have been granted to the United States. Every act of Congress, and every act of the Legislatures of the States, and

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every part of the Constitution of any State, which is repugnant to the Constitution of the United States, is necessarily void; and the determination of the Supreme Court of the United States, in every such case, is final and conclusive.

2. *To what cases does the original jurisdiction of the Supreme Court of the United States extend?*—314, 315. See page 90.

It is confined to those cases which affect ambassadors, other public ministers and consuls, and to those in which a State is a party. Congress has no power to extend this jurisdiction, and it has been made a question whether it is exclusive as well as original.

3. *What is meant by final judgments or decrees of State Courts from which an appeal lies to the Supreme Court of the United States?*—316.

The word "final," in the judiciary act of 1789, is understood to apply to all judgments and decrees which determine the particular cause; and it is not to be confined to those judgments and decrees which are so final as to terminate all further or renewed litigation, in a new suit on the same right.

4. *Was the right of the Supreme Court of the United States to reverse a judgment of the highest court in a State, reversing the judgment of a subordinate State court, ever brought in question?*—316-321.

Yes: but the Supreme Court decided that the appellate power of the United States did extend to cases pending in the State courts, and that the section of the judiciary act, giving the appellate right in specified cases by writ of error, was supported by the letter and spirit of the Constitution.

5. *In what cases has the Supreme Court of the United States authority to issue a writ of mandamus to the State courts?*—321-323.

It seems to be the better opinion that it has power to issue a mandamus when necessary to enforce its appellate jurisdiction, but that it has no such power in cases not arising under such jurisdiction, and when not required in the exercise of its original jurisdiction.

6. *What is the rule laid down by the Supreme Court, on the sub-*

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ject of jurisdiction on account of the interest a State has in the controversy?—323.

That it must be a case in which a State is either nominally or substantially the party; and that it is not sufficient that the State may be consequentially affected, as being bound to make retribution to her grantee upon the event of eviction.

7. *What is the rule as to the appellate jurisdiction of the Supreme Court?*—324.

That it exists only in cases in which it is affirmatively given. That court has decided* that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the Constitution in a qualified manner.

8. *Does that jurisdiction exist if a State be a party, and if it extend to a final judgment in a State court, on a case arising under the authority of the Union?*—327.

Yes; the appellate jurisdiction of the court includes two classes of cases—the first, depending on the character of the cause, whoever be the parties; and the second, on the character of the parties, whatever be the subject of controversy.

LECTURE XVI.

OF THE JURISDICTION OF THE FEDERAL COURTS IN RESPECT TO THE COMMON LAW, AND IN RESPECT TO PARTIES.

1. *Have the federal courts a common law jurisdiction in criminal matters?*—331–338.

A majority of the Supreme Court has decided† that the Circuit Courts could not exercise a common law jurisdiction in criminal cases. And in a subsequent case,‡ though a difference

* *Wiscart* v. *Douchy*, 3 Dallas, 321.

† *United States* v. *Hudson & Goodwin*, 7 Cranch, 32.

‡ *United States* v. *Coolidge*, 1 Wheaton, 415.

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of opinion continued to exist among the members of the court, it refused to review its former decision, or draw it in doubt.

2. *How about a common law jurisdiction in civil matters?*—341, *n.* (*d*).

The Supreme Court, at one time,* went far towards the admission and application of the common law to civil cases in the federal courts, but it has since declared† that there could not be a common law of the United States. Each of the States has its own local usages, customs, and common law. There was no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our federal system only by legislative adoption, and when a common law right is asserted, the courts look to the State in which the controversy originated.

3. *Has the common law then no influence on national jurisprudence?*—339.

Mr. Du Ponceau, in his "Dissertation on the nature and extent of the jurisdiction of the Courts of the United States," maintains that we have not, under our federal government, any common law, considered as a source of jurisdiction; but that the common law, considered merely as the means or instrument of exercising the jurisdiction conferred by the Constitution and laws of the Union, does exist, and forms a safe and beneficial system of national jurisprudence. When the jurisdiction is once granted, the rules of action under that jurisdiction, if not prescribed by statute, may and must be taken from the common law when they are applicable, because they are necessary to give effect to the jurisdiction.

4. *What is it necessary to set forth on the record in order to give jurisdiction where an alien is a party?*—343, 344.

The Supreme Court held‡ that it was necessary to set forth the citizenship of the respective parties, or the alienage, where

* *Robinson* v. *Campbell*, 3 Wheaton, 212; 10 *Ib.*, 159, S. P.
† *Wheaton* v. *Donaldson*, 8 Peter's R., 658.
‡ *Bingham* v. *Cabot*, 3 Dallas, 382.

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a foreigner was concerned, by positive averments, in order to bring the case within the jurisdiction of the Circuit Court; and that if there was not a sufficient allegation for that purpose on the record, no jurisdiction of the suit would be sustained. It is necessary, therefore, where the defendant appears to be a citizen of one State, to show, by averment, that the plaintiff is a citizen of some other State, or an alien; or, if the suit be upon a promissory note, by the endorsee, to show that the original payee was so, for it is his description, as well as that of the endorsee, which gives the jurisdiction.

5. *What is the rule where a corporation is a party?*—346, 347.

It has been held* that a corporation created and doing business in a State was an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, although some of the members of the corporation were not citizens of the State in which the suit was brought, and although the State itself might be a member of the corporation.

6. *What is the rule in regard to trustees?*—349, 350.

That a trustee who holds the legal interest is competent to sue in right of his own character as a citizen or alien, as the case may be, in the federal courts, and without reference to the character of his *cestui que trust*, unless he was created trustee for the fraudulent purpose of giving jurisdiction. This rule applies to executors and administrators, who are considered as the real parties in interest; but it does not apply to the general assignee of an insolvent debtor, and he can not sue in the federal courts, if his assignor could not have sued there. The 11th section of the judiciary act will not permit jurisdiction to vest by the assignment of a *chose in action* (cases of foreign bills of exchange excepted), unless the original holder was entitled to sue; and whether the assignment was made by act of the party, or of law, makes no difference. An executor or administrator is not an assignee within the meaning of the 11th section of the judiciary act. A vested jurisdiction is not divested by a subsequent change of domicil of one of the parties, *pendente lite*.

* *Louisville R. R. Co.* v. *Letson*, 2 How. U. S. R., 497.

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7. *What is the rule of proceeding where a State is interested, and not a party on record?*—350.

The Supreme Court decided,* that the Circuit Courts had lawful jurisdiction, under the act of Congress incorporating the National Bank, of a bill in equity brought by the bank for the purpose of protecting its franchises, which were threatened by the State of Ohio; and that, as the State itself could not be made a party defendant, the suit might be maintained against the officers and agents of the State who were intrusted with the execution of such laws.

LECTURE XVII.

OF THE DISTRICT AND TERRITORIAL COURTS OF THE UNITED STATES.

1. *What is the distinction in England between the* Instance *and the* Prize Court *of Admiralty?*—353, 354.

The Instance Court is the ordinary and appropriate court of admiralty, and takes cognizance of the general subjects of admiralty jurisdiction, and it proceeds according to the civil and maritime law. To constitute the Prize Court, or to call it into action in time of war, a special commission issues; it has exclusive cognizance of matters of prize and matters incidental thereto, and it proceeds to hear according to the general principles of the admiralty and the law of nations. The distinction between these two courts, or rather between these two departments of the same court, is kept up throughout all the proceedings; an appeal from the Instance Court lies to delegates—from the Prize Court, to commissioners specially appointed.

2. *Does this distinction exist in the jurisdiction of our District Courts?*—355, 356.

No; after considerable discussion on the point, the Supreme Court has decided that the District Courts of the United States

* *Osborn* v. *The Bank of the United States*, 9 Wheaton, 738.

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possess all the powers of Courts of Admiralty, whether considered as Instance or as Prize Courts; and their prize jurisdiction is completely exclusive.

3. *Over what cases have the District Courts, as Prize Courts, jurisdiction?*—356, 357.

Their ordinary prize jurisdiction extends to all captures in war, made on the high seas. "I know of no other definition of prize goods," said Sir William Scott, in the case of the *Two Friends** "than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy." The prize jurisdiction also extends to captures in foreign ports and harbors, and to captures made on land by naval forces, and upon surrenders to naval forces, either solely, or by joint operation with land forces. It extends to captures made in rivers, ports, and harbors of the captor's own country. The Prize Court extends also to all ransom bills upon captures at sea, and to money received as a ransom or commutation, on a capitulation to naval forces alone, or jointly with land forces.

4. *How far does the criminal jurisdiction of the District Court, as an Admiralty Court, extend?*—360–364.

The District Courts have, exclusive of the State courts, and concurrently with the Circuit Courts, cognizance of all crimes and offenses cognizable under the authority of the United States, and committed within their districts, or upon the high seas, where only a moderate corporal punishment, or fine, or imprisonment is to be inflicted.

It has been argued that the federal courts have, without any statute, exclusive criminal jurisdiction over maritime crimes and offenses, but it is now settled that they are, as Courts of Admiralty, to exercise only such criminal jurisdiction as is conferred upon them by act of Congress; that the United States courts have no unwritten criminal code from which to claim jurisdiction, and this principle extends as well to admiralty and maritime, as to common law offenses.† This limitation, however,

* 1 Rob. R., 228.

† The act of Congress of March 3d, 1825, enlarged the jurisdiction of the federal courts over many crimes committed against the United States in foreign ports and

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does not apply to private prosecutions in the District Court, as a Court of Admiralty or Prize Court, to recover damages for a marine tort.

5. *How are issues of fact tried in the District Courts?*—365, 372.

By a jury in all causes, except civil causes of admiralty and maritime jurisdiction, which are tried according to the course of the civil law, and without jury.

6. *What forms the dividing line between the admiralty and common law jurisdiction of the District Court?*—365–378.

The decisions and opinions on the point are so conflicting that it is impossible to define accurately the boundary line between the two jurisdictions. It seems, however, settled that, in interpreting the words, "cases of admiralty and maritime jurisdiction," used in the Constitution, the federal courts exercise more than that jurisdiction which was settled and in practice in this country under the English jurisprudence, when the Constitution was made.*

7. *How far does the jurisdiction of the District Courts, as Instance Courts, extend?*—378–380.

They possess a general jurisdiction in suits by seamen and salvors, and by material men, *in rem* and *in personam*. They have a general jurisdiction to enforce maritime liens, by process *in rem*, and there may be a maritime jurisdiction *in personam* where there is no lien, and consequently no jurisdiction *in rem*. The act of Congress of July 20th, 1790, section 6, has given a summary relief for seamen in the recovery of wages, by authorizing the district judge, or, in his absence, a magistrate, to summon the master before him, and to attach the vessel as security

on the high seas, and over certain specified offenses on board of American vessels by any of the American crew, in all places where the tide ebbs and flows; and the act of March 3d, 1835, extends the jurisdiction to offenses on any waters within the admiralty and maritime jurisdiction of the United States.

* A synopsis of the admiralty jurisdiction in this country is stated to contain, 1. Contracts between part owners, petitory and possessory suits; 2. Charter parties and affreightments; 3. Bottomry and hypothecation; 4. Contracts of material men; 5. Insurance; 6. Wages; 7. Salvage, civil and military; 8. Averages, contributions and jettisons; 9. Pilotage; 10. Ransom; 11. Surveys; 12. Maritime torts and trespasses.—*The Jurist*, January, 1841, page 408.

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for wages. The admiralty has cognizance of maritime hypothecations of vessels and goods in foreign ports, for repairs done, or necessary supplies furnished. Suits for seamen's wages are cognizable in the admiralty, though the contract be made upon land, provided it be not a contract under seal.*

8. *What about the Territories of the United States?*—384.

Exclusive and unlimited power of legislation over the Territories has been given to Congress by the Constitution, and is sanctioned by judicial decisions. And this power extends to the District of Columbia. It has been decided† that the Circuit Court of the District of Columbia has power to call before it any person found in the District, from the highest to the lowest; that no government officer in the District is above being reached by the process of the court.

LECTURE XVIII.

OF THE CONCURRENT JURISDICTION OF THE STATE GOVERNMENTS.

1. *What rights of sovereignty did the State governments retain on the adoption of the Constitution of the United States?*—387.

It was observed in The Federalist, that the State governments would clearly retain all those rights of sovereignty which they had before the adoption of the Constitution of the United States, and which were not by that Constitution exclusively delegated to the Union. The alienation of State power or sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which

* The principle which seems to be established is, that admiralty jurisdiction extends to all maritime causes and services, to be substantially performed on tide waters.

† 5 Cranch's C. C., 171; 12 Peter's S. C. R., 524.

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a similar authority in the States would be absolutely and totally contradictory and repugnant. In the judicial construction given from time to time to the Constitution, there has been no very essential variation from the above principles.

2. *Is the power given to Congress to organize a militia, exclusive?*—390, 391.

No; a State may organize, arm and discipline its own militia, in the absence of, or in subordination to, the regulations of Congress; but once Congress has acted on the subject and carried this power into effect, its laws are supreme, and all interfering regulations of the State suspended.

3. *What would be the consequence if both the federal and State governments laid a tax on the same article?*—392-394.

The claim of the United States would be preferred, and must be first satisfied. It would seem, therefore, that the concurrent power of legislation in the States is not an independent, but a subordinate and dependent power, liable, in many cases, to be extinguished, and, in all cases, to be postponed to the paramount or supreme law of the Union, whenever the federal and the State regulations interfere with each other.

4. *Can the judicial process of the federal courts be controlled by State laws?*—394.

No: Congress has exclusive authority to regulate proceedings and executions in the federal courts, and the States have no authority to control such process.

5. *How about the concurrent jurisdiction of the several States in matters of judicial cognizance?*—395–400.

The concurrent jurisdiction of the State tribunals depends, in judicial matters, altogether upon the pleasure of Congress, and may be revoked and extinguished, whenever Congress thinks proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; but the State courts will retain a concurrent jurisdiction, without an express provision to the contrary, in all cases where they had jurisdiction originally over the subject-matter.

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6. *Is the exercise of this concurrent jurisdiction obligatory on the State courts?*—400-408.

No: they have sometimes assumed, and sometimes declined jurisdiction, though expressly vested with it by act of Congress. The State authorities are left to infer their own duty from their own State authority and organization; but if they do voluntarily entertain jurisdiction of cases cognizable under the authority of the United States, they assume it upon the condition that the appellate jurisdiction of the federal courts shall apply.

7. *What effect has the sentence of either the federal or State court, in a matter where there is concurrent jurisdiction, on the jurisdiction of the other?*—399.

The sentence of either court, whether of conviction or acquittal, may be pleaded in bar of the prosecution before the other.

8. *Does the concurrent jurisdiction of State courts extend to criminal offenses?*—403.

No: their jurisdiction of federal causes is confined to civil actions, or to enforce penal statutes; they can not hold criminal jurisdiction over offenses exclusively existing as offenses against the United States. Every criminal prosecution must charge the offense to have been committed against the sovereign whose court sits in judgment upon the offender, and whose executive may pardon him.*

* It is considered that treason might be committed against a State, and be not a crime against the United States, but if the crime amount to treason against the United States, its cognizance belongs exclusively to the federal courts.

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LECTURE XIX.

OF CONSTITUTIONAL RESTRICTIONS ON THE POWERS OF THE SEVERAL STATES.

1. *What restrictions has the United States Constitution placed on the authority of the separate States, in cases not consistent with the objects and policy of the powers vested in the Union?*—407.

No State can enter into any treaty, alliance or confederation; grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, nor grant any title of nobility. No State can, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, nor engage in war unless actually invaded, or in such imminent danger as will not admit of delay.*

2. *What are bills of credit, within the purview of the United States Constitution?*—407, 408.

Promissory notes, or bills issued by a State government, exclusively on the credit of the State, and intended to circulate through the community for its ordinary purposes as money redeemable at a future day, and for the payment of which the faith of the State is pledged.†

3. *What is meant by an* ex post facto *law?*—410.

A short definition of an *ex post facto* law is, any law which renders an act punishable in a manner in which it was not punishable when it was committed. This includes punishment

* Although no State can be permitted to establish a permanent military government, yet a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority.—*Luther* v. *Borden*, 7 How., U. S. R., 71.

† In *Briscoe* v. *The Bank of Kentucky*, 11 Peters, 257, bills of credit were defined to be paper issued by the authority of a State, on the faith of the State, and designed to circulate as money. See 4 Peters, 410; 13 How., 12.

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either in a man's person or estate. *Ex post facto* laws are to be distinguished from retrospective laws, divesting vested rights, which, unless *ex post facto*, or impairing the obligation of contracts, are not prohibited by the Constitution, however repugnant they may be to principles of sound legislation.

4. *Can a State control the exercise of any authority under the federal government?*—409–411.

No; a State court can not annul the judgments, nor determine the extent of the jurisdiction of the courts of the Union; neither can it enjoin a judgment, nor stay proceedings of the federal courts; nor can it interfere with seizures of property made by revenue officers, under the laws of the United States, nor interrupt, by process of replevin, injunction or otherwise, the exercise of the authority of the federal officers, provided they had jurisdiction of the subject-matter.

5. *Can the federal courts control the action of the State courts?*—412.

Not otherwise than by means of their established appellate jurisdiction.

6. *Which are some of the leading decisions on the rule forbidding a State from passing any law impairing the obligation of contracts?*—413–422.

It has been decided that a State can not declare null and void, on the ground of fraud and corruption, letters patent by which it had granted State lands that had passed into the hands of a *bona fide* purchaser for a valuable consideration. If the Legislature of a State declare that certain lands shall not be subject to taxation, such a legislative act amounts to a contract which can not be rescinded by subsequent legislation. A legislative grant, competently made, vests an indefeasible and irrevocable title. And in the Dartmouth College case* it was held, that the charter granted by the British crown to the trustees of the college in 1769 was a contract within the meaning of the Constitution and protected by it; that the college was a private charitable institution, free from legislative control; and that the

* 4 Wheaton, 518.

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act of the Legislature of New Hampshire, altering the charter in a material respect without the consent of the corporation, impaired the obligation of the charter and was consequently void. A compact between two States has been held to be a contract within the constitutional prohibition. A discharge under a State insolvent law will not extinguish the remedy against the future property of the debtor, unless the debt has been contracted after the passing of the act, within the State which has passed the insolvent law and between citizens of the State.*

7. *What about the prohibition against State naturalization laws?* —423, 424.

The right to enact naturalization laws belongs exclusively to Congress.

8. *Can a State impose a tax on national stock?*—427, *n.* (*a*).

No; but a State tax on dividends arising from stock in the Bank of the United States, owned by a citizen of the State, has been held constitutional. As also a State tax on the stock itself, as individual property, when owned by residents; but not when owned by non-residents, for it must be a tax *in personam*.

9. *Within what jurisdiction are places ceded by any one of the several States to the United States?*—429–431.

Within that of the United States as to acts committed within those places. Such cessions are usually accompanied with a condition annexed, that all civil and criminal process issued under the authority of the State may be executed on the lands so ceded, in like manner as if the cession had not been made. And the acceptance of a cession, with such a reservation, is considered tantamount to an agreement by the federal government to permit the free exercise of such process, as being *quoad hoc* their own process, as to acts committed within the acknowledged jurisdiction of the State making the cession. But the inhabitants of such places can not exercise any civil or political privileges under the laws of the State.

* The prohibition against the impairing the obligation of contracts has been much modified by State laws and decisions (too numerous to be mentioned here), particularly the various exemption acts, which are considered to affect the remedy and not the contract.

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10. *State some of the decisions on the power of Congress to regulate commerce among the several States.*—431–436.

It has been decided that Congress has power to lay a general embargo, without any limitation as to time. An act of the Legislature of the State of New York, granting exclusive navigation of the waters of the State, by vessels propelled by steam, was held by the United States court to be repugnant to the rights and privileges conferred upon a steamboat navigating under a coasting license.*

11. *Does this power extend to the internal commerce of a State?* —436–439, *n.* 2.

The United States Supreme Court admitted that this power does not extend to commerce which is completely internal and does not concern more States than one. But the Court of Errors in New York have held that the coasting trade included commercial intercourse carried on between different parts of the same State on the sea-coast, or on a navigable river. The constitutionality of the State license laws has been finally settled in the Supreme Court of the United States, and their validity established,† but the sale of imported liquors by the importer in the original casks was not affected by such decision.

12. *How about inspection, quarantine and health laws?*—439.

They, as well as laws for regulating the internal commerce of a State, are component parts of the immense mass of residuary State legislation, over which Congress has no direct power, though it may be controlled when it directly interferes with their acknowledged power. And it is admitted that the power of Congress to regulate commerce on the navigable waters of the several States implies no cession of territory, or of public or private property.

* *Gibbons* v. *Ogden*, 9 Wheaton, 1.
† 5 How. U. S. R., 504–609.

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LECTURE XX.

OF STATUTE LAW.

1. *What is municipal law?*—447.

It is a rule of civil conduct, prescribed by the supreme power of a State. It is composed of written and unwritten, or statute and common law.

2. *What is statute law?*—447.

It is the express written will of the Legislature, rendered authentic by certain prescribed forms and solemnities.

3. *What authority has statute law in England, and to what extent does the English principle on that subject prevail with us?*—447, 448.

It is a principle of the English law, that an act of Parliament, delivered in clear and intelligible terms, can not be questioned in any court of justice. But this principle of the omnipotence of Parliament does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as are laws flowing from the sovereign power under any other form of government. But in this, and all other countries where there is a written Constitution, designating the powers and duties of the Legislature as well as of the other departments of the government, an act of the Legislature may be void as being against the Constitution. The law with us must conform, in the first place, to the Constitution of the United States, and then to the subordinate Constitution of its particular State; and if it infringes the provisions of either, it is so far void.

4. *By whom is the constitutionality of a law determined?*—449, 450.

By the judiciary. It is a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and duty, to declare every act of the Legislature,

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made in violation of the Constitution, or of any provision of it, null and void.

5. *From what time does a statute take effect?*—454, 455.

From its date, if no time be expressed. But remedial statutes may be of a retrospective nature, provided they do not impair contracts, partake of the character of *ex post facto* laws, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. And it seems to be settled, that the Legislature can not pass any declaratory law or act declaratory of what the law was before the passage of such act, so as to give it any binding weight with the courts: it is only evidence of the sense of the Legislature as to the preëxisting law.

6. *What is the distinction between public and private acts?*—459.

Public acts relate to the State or country at large, and private acts concern the particular interest or benefit of certain individuals, or of particular classes of men. A private act does not bind strangers in interest to its provisions, and they are not bound to take notice of it, even though there be no general saving clause of the rights of third persons.

7. *What are the rules for interpreting statutes?*—460–465

The preamble of a statute may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. The Constitution of New Jersey declares that every law, and that of New York and some other States, that every private or local bill shall embrace but one object, and that that shall be expressed in the title. The object of the requirement is, that neither this Legislature nor the public may be misled by the title of an act.

It is an established rule in interpreting statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of the statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms, and control the

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strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. The words of a statute, if of common use, are to be taken in their natural, ordinary signification and import; and if technical words are used, they are to be taken in a technical sense, unless it clearly appears, from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or legal acceptation.

Several acts *in pari materia*, or relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view and as acting upon one system. Statutes are likewise to be construed in reference to the principles of the common law, and a good rule of interpretation of all statutes is to consider, what was the common law before the act? [2] what was the mischief against which the common law did not provide? [3] what remedy has the act provided to cure the defect? [4] and what is the true reason of the remedy? Penal statutes are to be construed strictly; remedial ones liberally, and *ultra*, but not *contra*, the strict letter.

8. *What is the effect of temporary statutes?*—465.

If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or is repealed. Though the offense be committed before the expiration of the act, the party can not be punished after it has expired, unless a particular provision be made by law for the purpose. If a statute be repealed, and afterward the repealing act be repealed, this revives the original act; and if a statute be temporary and limited to a given number of years, and expires by its own limitation, a statute which had been repealed and supplied by it is *ipso facto* revived. Where a temporary act is continued by another, all acts, civil and criminal, are to be charged under the authority of the first act.

9. *What is the effect of a penalty prescribed in a statute?*—467.

If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful though there be no prohibitory words in the statute. A contract has been held

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void under a statute, though there was a penalty imposed for making it, and it is settled that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same, whether a thing be prohibited absolutely or only under a penalty. But when the object of the law is merely to protect the revenue, the imposition of the penalty is not to be construed as a prohibition of the contract.

LECTURE XXI.

OF REPORTS OF JUDICIAL DECISIONS.

1. *What does the common law include?*—469.

The common law includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims, which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice without any legislative act or interference. In the language of Sir Matthew Hale, the common law of England is "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men."

2. *Has the English common law been adopted with us?*—472.

The common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by most of the State constitutions. And the English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.

3. *What is the force of adjudged cases?*—473–475.

The reports of judicial decisions contain the most certain

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evidence, and the most authoritative and precise application of the rules of the common law. A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. The language of Sir William Jones is exceedingly forcible on this point. "No man," says he, "who is not a lawyer, would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate."

4. *Which are the principal of the old English reports?*—480–497.

The oldest reports extant on the English law are the Year Books, written in law French, and extending from the beginning of the reign of Edward II. to the latter end of the reign of Henry VIII., a period of about two hundred years. The reports of Dyer relate to the reigns of Henry VIII., Edward VI., Mary and Elizabeth. Plowden's Commentaries embrace the same period as Dyer's reports. Lord Coke's reports are confined to the reigns of Elizabeth and James, and those of Lord Hobart to the time of James. Croke's reports contain decisions in the reigns of Elizabeth, James, and Charles. Yelverton's reports are a small collection of select cases in parts of the reigns of Elizabeth and James. In the reign of Charles II., the most distinguished reports are those of Chief Justice Saunders, which have been frequently reëdited with copious notes of modern decisions. Of the same reign are the reports of the Chief Justice Vaughan, Sir Thomas Jones, Sir Creswell Levinz, and Sir Godfrey Palmer.

The principal English reports since the English revolution are those of Lord Raymond and Serjeant Salkeld, during the reigns of William and Mary, and Queen Anne; of Strange, Comyns, Willes, and Wilson, during the reigns of George I. and II. The reports of Burrow, Cowper, and Douglas, contain the substance of Lord Mansfield's decisions, which are amongst the most interesting reports in the English law.

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The system of equity is equally to be found embodied in the reports of adjudged cases; and the rules, usages, and precedents, in the Court of Chancery, are as fixed as those which govern other tribunals. The principal English Chancery reporters are Vernon, Peere Williams, Talbot, Vesey and Atkyns, Eden, Brown, Cox, and Vesey, Jr.

The decisions of Chancellors Kent and Walworth, of New York State, are to be found in Johnson's, Paige's, and Barbour's Chancery Reports. These decisions, from their more entire application to our circumstances, carry with them greater authority than those of English chancellors, and they confer equal lustre on the men who delivered them and on the State which produced such men. The New York Court of Chancery has been recently abolished, and its jurisdiction conferred on the Supreme Court of that State.

LECTURE XXIII.

OF THE CIVIL LAW.

1. *When was the civil law, as it has come down to us, digested?* —515.

The great body of the Roman or civil law was collected and digested by order of the Emperor Justinian, in the former part of the sixth century. With most of the European nations, and in the new States in Spanish America, in Lower Canada, and in one of the United States, Louisiana, it constitutes the principal basis of their unwritten or common law. It exerts a very considerable influence on our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate's or consistorial courts.

2. *Where is the existing body of the Roman or civil law principally to be found?*—538–548.

In the compilations made under Justinian, which consist of

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the following works, 1. The Code, in twelve books, being a collection of all the imperial statutes that were thought worth preserving, from Hadrian to Justinian. 2. The Institutes, or Elements of the Roman Law, in four books, containing the fundamental principles of the ancient law in a small body for the use of students. 3. The Digest or Pandects, which is a vast abridgment, in fifty books, of the decisions of prætors, and the writings and opinions of the ancient sages of the law. This work is supposed to contain the embodied wisdom of the Roman people in civil jurisprudence for nearly twelve hundred years, and the European world has ever since had recourse to it for authority and direction upon public law, and for the exposition of the principles of natural justice. 4. The Novels of Justinian, a collection of new imperial statutes, passed subsequent to the Code, and made to supply the omissions and correct the errors of the preceding publications. The one hundred and eighteenth Novel is considered the groundwork of the English and American statutes of distribution of intestates' effects. The civil law followed the progress of Roman power into Britain, and was taught there for some time after the expulsion of the Romans; but its influence was finally confined to the ecclesiastical courts, and the Courts of Chancery and of Admiralty.

3. *Which are some of its principal merits?*—547.

On subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. The rights and duties of tutors and guardians are regulated by wise and just principles. All the rights, duties, and incidents appertaining to property, trusts in all their modifications, and personal contracts of almost every kind, express and implied, are defined and illustrated with a clearness and brevity without example.

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LECTURE XXIV.

OF THE ABSOLUTE RIGHTS OF PERSONS.

1. *What are the rights of persons in private life?*—1.

They are either absolute, being such as belong to individuals in a single, unconnected state; or relative, being those which arise from the civil and domestic relations.

2. *Which are the absolute rights of individuals?*—1.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared, by the people of this country, to be natural, inherent and inalienable.

3. *When was the principal Declaration of Rights made in this country?*—5–7.

In October, 1765, a convention of delegates from nine colonies assembled at New York, and made and published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were, the exclusive right to tax themselves, and the privilege of trial by jury. The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the memorable Declaration of Rights of the first Continental Congress, in October, 1774, and which was a representation of all the colonies except Georgia. That declaration constituted the basis of those subsequent bills of rights which, under various modifications, pervade all our constitutional charters. It was declared, "that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever, a right to dispose of either without their consent; that their ancestors, who first settled in the colo-

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nies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects; and by such emigration they by no means forfeited, surrendered or lost any of these rights; 4that the foundation of English liberty, and of all free government, was the right of the people to participate in the legislative power, and they were entitled to a free and exclusive right of legislation, in all matters of taxation and internal policy, in their several provincial legislatures, where their right of representation could alone be preserved; 5that the respective colonies were entitled to the common law of England, and more especially to the great and incontestable privilege of being tried by their peers of the vicinage, according to the course of that law; 6that they were entitled to the benefit of such English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances; 7that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws." On the formation of the several State constitutions, after the colonies had become independent States, it was, in most instances, thought proper to collect, digest, and declare, in a precise and definite manner, and in the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind.

4. *What are the principal provisions to be found in our constitutions, for guarding the right of personal security?*—12–16.

1 That no person, except on impeachment, and in the cases arising in the military and naval service, shall be held to answer for a crime above petit larceny, unless he shall have been previously charged, on the presentation or indictment of a grand jury.

2 No person shall be subject, for the same offense, to be twice put in jeopardy of life or limb.

3 Nor be compelled, in any criminal case, to be a witness against himself.

4 In all criminal prosecutions, the accused is entitled to a speedy and public trial by an impartial jury.

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5 And upon the trial he is entitled to be confronted with the witnesses against him.

6 To have compulsory process for witnesses in his favor.

7 To have the assistance of counsel in his defense.

8 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9 No bill of attainder, nor *ex post facto* law can be passed.

10 No person can be deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers.

11 Every person, in case of impending danger, is entitled to the protecting arm of the magistrate, and may require his adversary to be bound to keep the peace.

12 If violence has been actually offered, the offender is not only liable to a public prosecution and punishment, but is bound also to render the party injured compensation in damages.

13 Every man may exercise the natural right of self-defense, in those cases where the law is either too slow, or too feeble, to stay the hand of violence.

14 Homicide is justifiable when necessary for self-defense, or in defense of near relations, against persons attempting to commit a known felony, with force, against one's person, habitation or property.

15 Every one is entitled to the enjoyment of his reputation.

5. *Into what two kinds does the law distinguish injuries affecting the reputation of individuals?*—16.

Into slander spoken, and slander by writing, signs, or pictures, the latter of which is commonly called a libel. The Roman law took this distinction between slander spoken and written, and the same distinction prevails in our law, which considers the slander of a private person by words, in no other light than as a civil injury, for which a pecuniary compensation may be obtained.

6. *In what does this injury consist?*—16, *n.* 1. C. C. 45. 46.

In falsely and maliciously charging another with the commission of some public offense, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment;

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or, lastly, with any other matter or thing, by which special injury is sustained. And certain words are actionable in themselves, without showing other special damage than that they deeply wound the feelings, and bring the party charged into contempt and disgrace. There may also be slander of title to property, which consists in falsely and maliciously denying the plaintiff's title, whereby he suffers some injury.

7. *What is a libel?*—17.

A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one living, and expose him to public hatred, contempt, or ridicule. A malicious intent toward government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel.

8. *In what light does the law consider this grievance?*—17.

As a public as well as a private injury; and it has rendered the party not only liable to a private suit at the instance of the party libeled, but answerable to the State by indictment, as guilty of an offense tending directly to a breach of the public peace. But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech and of the press should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States. It has, accordingly, become a constitutional principle in this country, that "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press."

9. *When is the first private suit for slanderous words to be met with in the English law?*—18.

In the reign of Edward III., and for the high offense of charging another with a crime which endangered his life.

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10. *What is the general rule of evidence in prosecutions for injuries to private reputation?*—18–24.

That in a private action of slander for damages, even in the action of *scandalum magnatum*, the defendant may justify, by showing the truth of the fact charged. But in the case of a public prosecution for a libel, it became the established principle of the English law, as declared in the Court of Star Chamber, about the beginning of the reign of James I., that the truth of the libel could not be shown by way of justification. The weight of judicial authority is, that the English common law doctrine of libel is the common law doctrine of this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions. The act of Congress of 14th July, 1798, made it an indictable offense to libel the government, or Congress, or President of the United States; and made it lawful for the defendant to give in evidence, upon the trial, the truth of the matter contained in the publication charged as a libel. And in many, if not most of the States, special provisions have been made in favor of allowing the truth to be given in evidence in public prosecutions for libel.

11. *What are the principal statute provisions in New York, on the writ of* habeas corpus?—29–31.

That all persons restrained of their liberty, under any pretense whatsoever, are entitled to prosecute this writ, unless they be persons detained: 1. By process from any court or judge of the United States, having exclusive jurisdiction in the case. 2. Or by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction, other than in a case of commitment for any alleged contempt. The application for the writ must be to the Supreme Court, or chancellor, or a judge of the court, or other officer having the powers of a judge at Chambers; and it must be by petition in writing, signed by, or on behalf of the party; and it must state the grounds of the application, and the facts must be sworn to. The penalty of one thousand dollars is given in favor of the party aggrieved, against every officer and against every member of the court assenting to the refusal, if any court or officer authorized to grant the writ shall refuse it when legally applied for. If the per-

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son to whom the writ is directed, or on whom it is served, shall not promptly obey the writ, by making a full and explicit return, and shall fail to produce the party, without a sufficient cause, he is liable to be forthwith attached and committed, by the person granting the writ, to close custody, until he shall have obeyed the writ. The party suing out the writ is to be remanded, if detained: 1. By process of any court of the United States having exclusive jurisdiction. 2. Or by virtue of a final decree, or judgment, or process thereon, of any competent court of civil or criminal jurisdiction. 3. Or for any contempt specially and plainly charged, by some court or person having authority to commit on such a charge, and when the time for which the party legally detained has not expired. But no inquiry is to be made into the legality of any process, judgment or decree, or the justice or propriety of the commitment in the case of persons detained under process of the United States, where the court or officer has exclusive jurisdiction; nor where the party is detained under the final decree or judgment of a competent court; nor where the commitment, made by any court, officer or body, according to law, is for a contempt, and duly charged. The remedy, if the case admits of one, is by *certiorari*, or writ of error. The court or officer awarding the writ may, in other cases, examine into the merits of the commitment, and hear the allegations and proof arising thereon in a summary way, and dispose of the party as justice may require. A person discharged upon *habeas corpus* is not to be re-imprisoned for the same cause, and if any person solely, or as a member of any court, or in execution of any order, knowingly re-imprison such party, he forfeits a penalty of twelve hundred and fifty dollars to the party aggrieved, and is to be deemed guilty of a misdemeanor, and liable to fine and imprisonment.

12. *Is the writ* ne exeat *in force in this country?*—33, 34.

In England, the king, by the prerogative writ, *ne exeat*, may prohibit a subject from going abroad without license, but with us this writ is not in use, except for civil purposes, between party and party, to prevent debtors escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to

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hold to bail, or compel a party to give security to abide the decree.

13. *What has the Constitution of the United States ordained upon the subject of religion?*—35.

That Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof, and the same principle appears in all the State constitutions. The principle is generally (though not universally) announced in them without any kind of qualification or limitation annexed, and with the exclusion of every species of religious test.

LECTURE XXV.

OF ALIENS AND NATIVES.

1. *Who are natives?*—39, *n.* (*a*).

All persons born within the jurisdiction and allegiance of the United States. If they were resident citizens at the time of the Declaration of Independence, though born elsewhere, and deliberately acceded to it an express or implied sanction, they became parties to it, and are to be considered as natives; their social tie being coeval with the existence of the nation.

That all persons born within the jurisdiction are citizens, is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. In New York, the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States, was extensively and learnedly discussed,* and it was adjudged that the subject of alienage, under our national compact, was a national subject, and that the law on this subject, which prevailed in all the United States, became the common law of the United States

* See 1 Sandf. Chan. R., 584, 639.

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when the union of the States was consummated; and the general rule above stated is, consequently, the governing principle or common law of the United States, and not of the individual States separately considered. The right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual States separately considered. The question is of national and not individual sovereignty, and is governed by the principles of the common law which prevail in the United States, and became, under the Constitution, to a limited extent, a system of national jurisprudence. It was accordingly held in that case that the complainant, who was born in New York of alien parents during their temporary sojourn there, and returned while an infant, during the first year of her birth, with her parents to their native country, and always resided there afterwards, was a citizen of the United States by birth. This was the principle of the English common law in respect to all persons born within the king's allegiance, and was the law of the colonies, and became the law of each and all of the States when the Declaration of Independence was made, and continued so until the establishment of the Constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained.

2. *What is the doctrine of the English law as to the allegiance of natural-born subjects?*—42, 43.

That they owe an allegiance which is intrinsic and perpetual, and which can not be divested by any act of their own. In the case of Macdonald, who was tried for high treason, before Chief Justice Lee, and who, though born in England, had been educated in France, and spent his riper years there, his counsel spoke against the doctrine of natural allegiance as slavish, and repugnant to the principles of their revolution. The court, however, said, that it had never been doubted, that a subject born, taking a commission from a foreign prince, and commiting high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private subject to shake off his allegiance and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or

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employing a subject of Great Britain, to dissolve the bond of allegiance between the subject and the crown. Entering into foreign service without the consent of the sovereign, or refusing to leave such service, when required by proclamation, is a misdemeanor at common law.

3. *What is the rule on this subject, in the United States?*—43—49, *notes.*

The better opinion would seem to be, that a citizen can not renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation in the case, the rule of the English common law remains unaltered. This rule has been expressly declared by the Supreme Court of the United States, who held* that the marriage of a *feme sole* with an alien produced no dissolution of her native allegiance, and that it was the general doctrine that no person could, by any act of their own, without the consent of the government, put off their allegiance and become aliens. The naturalization laws of the United States are, however, inconsistent with this general doctrine, for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it.

4. *What is the law of France on this point?*—50.

The French law will not allow a natural born subject of France to bear arms, in time of war, in the service of a foreign power, against France; and yet, subject to that limitation, every Frenchmen is free to abdicate his country.

5. *Who is an alien?*—50–52.

An alien is a person born out of the jurisdiction of the United States. There are, however, some exceptions to this rule, as the children of ambassadors (and other citizens temporarily absent), born abroad. By an act of Congress of the 14th of April, 1802, it is declared that "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on the subject by the government of the

* 3 Peter's U. S. R., 242.

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United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." This provision has been adjudged to be prospective in its operation. And by an act passed February 10th, 1855, persons theretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of this country, shall be deemed and are declared to be citizens of the United States. But the rights of citizenship shall not descend to persons whose fathers never resided in the United States. By the same act, a woman who might be naturalized under the existing laws, and who is or shall be married to a citizen of the United States, shall be deemed a citizen.

6. *What is the rule of the common law as to an alien's right to hold real estate?*—53. C. C. §§ 671-672 + 1404.

That an alien can not acquire title to real property by descent, or created by other mere operation of law.

7. *What is the common law rule, if an alien purchase land, or if land be devised to him?*—54.

That he may take and hold, until an inquest of office has been had; but upon his death, the land would instantly, and of necessity (as the freehold can not be kept in abeyance), without any inquest of office, escheat and rest in the State, because he is incompetent to transmit by hereditary descent.

8. *May natural-born subjects inherit, through an alien, the estates of their ancestors?*—56.

They may now in most, if not all, of the States.

9. *Has the distinction between* antenati *and* postnati, *in reference to our Revolution, been judicially considered since the establishment of our independence?*—56, 57.

Yes, frequently; and the principle of the common law contained in Calvin's case,* viz., that the division of an empire

* 7 Co. 1, 27.

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worked no forfeiture of previously vested rights of property, has been often acknowledged in our American tribunals.

10. *What is the prevailing doctrine on this subject, in regard to the treaty of peace in* 1783, *between Great Britain and the United States?*—60, 61.

That by that treaty Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became aliens in respect to the government to which they did not adhere. This is the meaning of the treaty of 1783, and it put an end to all conflicting and double allegiance growing out of the Revolution.

11. *What property may aliens acquire under the common law?*—61–64.

They may take a lease for years of a house for the benefit of trade; and they are capable of acquiring, holding, and transmitting personal property in like manner as our citizens, and they can bring suits for the recovery and protection of that property. They may take a mortgage upon real estate, by way of security for a debt, and are entitled to come into a court of equity, and have the mortgage foreclosed.

And now by statutory provisions in nearly all of the States of the Union, the common law disabilities of aliens, in regard to real property, have been essentially removed. In New York, Virginia, and other States, resident aliens are now vested with nearly the same rights of property as native citizens.

12. *In what manner, under the act of May,* 1828, *may an alien become a citizen of the United States?*—64, 65.

It is required that he declare, on oath, before a State court, being a court of record, with a seal and clerk, and having common law jurisdiction, or before a Circuit or District Court of the United States, or before a clerk of either of said courts, two years, at least, before his admission, his intention to become a citizen, and to renounce his allegiance to his own sovereign. This declaration need not be previously made, if the alien resided here before the 18th June, 1812, and has since continued

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to reside here; provided such residence be proved to the satisfaction of the court, and provided it be proved by the oath or affirmation of two witnesses, citizens of the United States, that he has resided, for at least five years immediately preceding the time of such application, within the limits and under the jurisdiction of the United States. The names of the witnesses, and the place or places where the applicant has resided for at least the five years, are to be set forth in the record of the court. And if the applicant shall have been a minor, under twenty-one years of age, and shall have resided in the United States three years next preceding his arrival to majority, he may also be admitted a citizen without such previous declaration; provided he has arrived at the age of twenty-one years, and shall have resided five years in the United States, including the three years of his minority, and shall make the delaration aforesaid at the time of his admission, and shall declare on oath, and prove, to the satisfaction of the court, that for three years next preceding it had been his *bona fide* intention to become a citizen, and shall in all other respects comply with the laws in regard to naturalization. In all other cases the previous declaration is requisite, and at the time of his admission, his country must be at peace with the United States, and he must, before one of these courts, take an oath to support the Constitution of the United States, and likewise an oath to renounce and abjure his native allegiance. He must, at the time of his admission, satisfy the court, by other evidence than his own oath, that is, by the oath of at least two citizens of the United States, that he has resided five years at least within the United States, and one year at least within the State where the court is held; and if he have arrived after the peace of 1815, his residence must have been continued for five years next preceding his admission, without being at any time, during the five years, out of the territory of the United States. He must satisfy the court, that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same. He must, at the same time, renounce any title, or order of nobility, if any he hath. The law provides that the children of persons duly naturalized, being minors at the time, shall, if dwelling in

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the United States, be deemed citizens. It is further provided that if any alien shall die after his declaration, and before actual admission as a citizen, his widow and children shall be deemed citizens.

13. *What is the effect of naturalization?*—66.

A person, thus duly naturalized, becomes entitled to all the privileges and immunities of natural-born subjects, except that a residence of some years is necessary to enable him to hold a seat in Congress, and no person except a natural-born citizen is eligible to the office of Governor in some of the States, or President of the United States.

14. *How will the personal property of an alien, who dies before taking any steps toward naturalization, go?*—67.

According to his will, if he have made any; or if he died intestate, then according to the law of distribution of the place of his domicil at the time of his death.

15. *To whom does the act of Congress confine the description of aliens capable of naturalization?*—72.

To "free white persons." It is supposed this excludes the inhabitants of Africa, and their descendants, and it may become a question to what extent persons of mixed blood are to be excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are "white persons," within the purview of the law. It is the declared law of New York and South Carolina, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of government, and, consequently, never can be made citizens under the act of Congress.

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LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

1. *What is the primary and most important of the domestic relations?*—75.

That of husband and wife.

2. *In what has it its foundation?*—75.

In nature, and it is the only lawful relation by which Providence has permitted the continuance of the human race.

3. *What is its moral influence?*—75.

In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.

4. *Who are capable of contracting marriage?*—75–79.

1. All persons who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, as idiots and lunatics (except in their lucid intervals), are incapable of agreeing to any contract, and of course to that of marriage. A marriage procured by force or fraud is also void, *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question. The basis of the marriage contract is the consent of the parties, and the ingredient of fraud or duress is fatal in this as in any other contract, for the free assent of the mind is wanting. The common law allowed divorces *à vinculo, causa metus, causa impotentiæ*, and those were cases of a fraudulent contract. It is proper in all these cases that the objection to the marriage should be judicially investigated in a suit to annul the marriage; and jurisdiction in the case properly belongs to the ecclesiastical courts in England, and to the courts of equity in this country. It is de-

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clared by statute in New York that any such marriage shall be void from the time its nullity shall be declared by a court of competent authority. It is said that error will, in some cases, destroy a marriage and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the ground of the contract; and it would be difficult to state a case, in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced.

2. No persons are capable of binding themselves in marriage until they have arrived at the age of consent, which, by the common law of the land, is fixed at fourteen in males, and twelve in females. This rule was derived from the civil law which established the same periods of twelve and fourteen, as the competent age to render the contract binding. The same rule prevailed in France, before their Revolution; but by the code of Napoleon the age of consent was raised to eighteen in males, and fifteen in females, though a dispensation from the rule may be granted for good cause. In some of the States the common law rule has been allowed to remain, while in most of them statutory regulations have altered the age of consent to a more advanced period of life.

3. No person can marry while the former husband or wife is living. Such second marriage is by the common law absolutely null and void; and it is probably an indictable offense in most, if not all, of the States of the Union. In New York, it is declared, by statute, to be an offense punishable by imprisonment in the State prison, in all but the following cases: when the husband or wife, as the case may be, of the party who remarries, remains continually without the United States for five years together; or when one of the married parties shall have absented himself or herself from the other by the space of five successive years, and the one re-marrying shall not know the other, who was thus absent, to be living within that time; or

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when the person re-marrying was, at the time of such marriage, divorced by sentence of a competent court for other cause than the adultery of such person; or if the former husband or wife of the person re-marrying had been sentenced to imprisonment for life; or if the former marriage has been duly declared void, or made within the age of consent.

5. *How does the law regard the intermarriage of relations?*—81–84.

In most countries of Europe in which the canon law has had authority or influence, marriages are prohibited between near relations by blood or marriage. Prohibitions similar to the canonical disabilities in the English ecclesiastical law were contained in the Jewish laws; and they existed also in the laws and usages of the Greeks and Romans, subject to considerable alternations of opinion, and with various modifications and extent. It is very difficult to ascertain exactly the point at which the laws of nature have ceased to discountenance the union. It is very clearly established that marriages between relations by blood in the lineal ascending or descending lines are unnatural and unlawful, and they lead to a confusion of rights and duties. On this point, the civil, canon, and the common law are in perfect harmony. In several of the United States, marriages within the Levitical degrees, under some exceptions, are made void. In New York, since 1830, marriages between relatives of the ascending and descending lines, and between brothers and sisters, of the half as well as of the whole blood, are declared incestuous and void. So, also, in Massachusetts; and in both these States such marriages are criminal offenses, and punishable as such. In Louisiana, marriages are prohibited among collateral relations, not only between brother and sister, but between uncle and niece, and aunt and nephew. It was stated that, in 1843, marriage between a man and his deceased wife's sister was lawful in every State of the Union, except Virginia. C.C. 59.

6. *What is the common law rule respecting the consent of parents and guardians?*—85.

That it is not requisite to the validity of marriage. C.C. 69.

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7. *What are the ceremonies required?*—86, 87.

No peculiar ceremonies are requisite by the common law, to the valid celebration of marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, and which the parties can not dissolve, and it is equally binding as if made *in facie ecclesiæ*; though this point is not quite free from doubt. C.C. 55 - 4 68 - 75

8. *In what light does the law consider marriage?*—87.

In no other light than as a civil contract.

9. *How must the consent of the parties be declared?*—87–91.

It may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or public prosecutions for bigamy. This facility in forming the marriage contract by the common and ecclesiastical law, existed in those American States where the common law has not been altered on this point, or remains in force, as in New York, South Carolina, and Kentucky. In some of the States, publication of bans, consent of parents in certain cases, the presence of a minister or magistrate, and other solemnities are required by statute to constitute a valid marriage; but wherever there are no such statutory provisions, the contract is everywhere in this country (except in Louisiana) under the government of the English common law. C.C. 55 - 69.

10. *By the laws of what place is the validity of marriage adjudged?*—91–93.

As a general rule, marriage valid by the laws of the place where it is celebrated is valid everywhere. The principle is, that with respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence.

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11. *What are the incidents of marriage respecting property, according to the* jus gentium *?—94, n. (b).*

They are stated by Mr. Justice Story, as follows: 1. That where there is a marriage in a foreign country, and an express nuptial contract concerning personal property, it will be sustained everywhere, unless it contravenes some positive rule of law or policy. But as to real property, it will be made subservient to the *lex rei sitæ*. 2. Where such a contract applies to personal property, and there is a change afterwards of the matrimonial domicil, the law of the actual domicil will govern as to future acquisitions. 3. If there be no such contract, the matrimonial domicil governs all the personal property everywhere, but not the real property. 4. The matrimonial domicil governs as to all acquisitions present and future, if there be no change of domicil. 5. If there be, then the law of the actual domicil will govern as to future acquisitions, and the law *rei sitæ* as to real property. If the marriage takes place in a foreign country *in transitu*, and where the parties had no intention of fixing their domicil, the law of the actual or intended domicil of the parties governs as to the incidents of the marriage; and it is a general rule that if the husband and wife had different domicils when they married, the domicil of the husband became the true and only matrimonial domicil.

LECTURE XXVII.

OF THE LAW CONCERNING DIVORCE.

1. *How long does marriage continue in force?—95.*

When a marriage is duly made, it becomes of perpetual obligation, and can not be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.

2. *What are the provisions made by the Revised Statutes of New York, on the subject of divorce?—96, 97.*

They have authorized the chancellor (now the Supreme

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Court), on suit brought, to declare void the marriage contract: 1. If either of the parties, at the time of the marriage, had not attained the age of legal consent. 2. If the former husband or wife was living and the marriage in force. 3. If one of the parties was an idiot or lunatic. 4. If the consent of one of the parties was obtained by force or fraud. 5. If one of the parties was physically incapable of entering into the marriage state. All issues upon the legality of a marriage, except where it is sought to be annulled on the ground of physical incapacity of one of the parties, are to be tried by a jury upon a feigned issue. A marriage shall not be annulled for the first of the above causes on the application of the party of full age at the time of the marriage, or if the parties, after both have attained the age of consent, have voluntarily cohabited. It may be annulled for the second cause on the application of either party during the life of the other; but if contracted in good faith, the issue shall be entitled to inherit as legitimate children. It may be annulled for the third cause on the application of a relative or next friend of the idiot or lunatic. But cohabitation after the lunacy has ceased will bar the divorce; and the children of any marriage annulled on such ground succeed as legitimate children. It may be annulled for the fourth cause, during the life of the parties, on the application of the party whose consent was unduly obtained, provided there was no subsequent voluntary cohabitation. The custody of the children is to be given to the innocent, and provision made for them out of the estate of the guilty, party. A marriage is to be annulled for the last cause above-mentioned only on the application of the innocent party, and the suit must be brought within two years after the marriage.

3. *As the law now stands in New York, in what three cases only, can a bill of divorce for adultery be obtained?*—98.

1. If the married parties are inhabitants of the State at the time of the commission of the adultery. 2. If the marriage took place in the State, and the party injured be an actual resident at the time of the adultery committed, and at the time of filing the bill. 3. If the adultery was committed in the State, and the injured party, at the time of filing the bill, be an actual inhabitant of the State.

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4. *What is the punishment, in New York, of a defendant if guilty?*—99.

Disability from re-marrying during the life of the other party.

5. *What are the provisions respecting the legitimacy of children in such cases?*—99, 100.

If the wife be the complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, is not to be affected by the decree; and if the husband be the complainant, the legitimacy of the children, born or begotten before the commission of the offense charged, is not to be affected by the decree. The statute further provides, that if the wife be the complainant, the court is to make a suitable allowance, in sound discretion, out of the defendant's property, for the maintenance of her and her children, and compel the defendant to abide the decree. The court is also to give to the wife, being the injured party, the absolute enjoyment of any real estate belonging to her, or of any personal property derived by title through her, or acquired by her industry. If, on the other hand, the husband be the complainant, then he is entitled to retain the same interest in the wife's estate, which he would have if the marriage had continued; and he is also entitled to her personal estate and *choses in action* which she possessed at the time of the divorce, equally as if the marriage had continued; and the wife loses her title to dower, and to a distributive share of her husband's personal estate.

6. *In what cases, in the State of New York, may the court refuse to decree a divorce, though the fact of adultery be established?*—101, 102.

In the four following: 1. If the offense was committed by the procurement or with the connivance of the complainant. 2. If it has been forgiven, and the forgiveness proved by express proof, or by the voluntary cohabitation of the parties with knowledge of the fact. 3. Where the suit has not been brought within five years after the adultery. 4. Or where the complainant has been guilty of the same offense. All these exceptions, except the positive limitation as to time, were settled and acknowledged principles of general jurisprudence applicable to the subject.

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The policy of New York has been against divorces from the marriage contract, except for adultery.

7. *How about the law of divorce in some of the other States of the Union?—Notes to page 96, et seq.*

The courts in Massachusetts, Delaware, Ohio, North Carolina, Alabama, Illinois, and probably in other States, are authorized by statute to grant divorces *causa impotentiæ*. In Massachusetts, by the Revised Statutes of 1836, marriages prohibited on account of consanguinity or affinity, or when the former husband or wife is alive, or when either party was at the time insane or an idiot, or between a white person and a negro, Indian or mulatto, are absolutely void without any legal process. So of marriages under the age of consent, or when either party is guilty of adultery or sentenced to the State prison. In Vermont, marriages prohibited on account of consanguinity or affinity, or on account of a former husband or wife living, are absolutely void without any legal process. The other provisions of the law of divorce in that State are very similar to those in New York, and in neither of these States can a marriage be annulled for adultery solely on the declarations or confessions of the parties. In most of the States divorces *a vinculo*, or from bed and board, are granted for intolerable ill-usage, or willful desertion, or unheard-of-absence, or habitual drunkenness. In some of the States, the Legislatures frequently pass special acts granting divorces, while in others, such legislative divorces are prohibited by the Constitution, and jurisdiction of the matter confined exclusively to the judiciary. And in nearly all the States parties are required to have resided in the State for a greater or less time before they can apply in such State for divorce.

8. *What is the effect of a foreign divorce, or how far is a divorce in one State valid in another?*—107–118.

The question has never been judicially raised and determined in the United States, and it has generally been considered that the State governments have complete control and discretion in the case. In *Harding* v. *Allen*,* it was adjudged by the Supreme Judicial Court in Maine, that a decree of divorce pro-

* 9 Greenleaf's R., 140.

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nounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband. This is deemed a correct and valuable decision in this country, though contrary to the English rule—which is, that a foreign divorce *a vinculo*, from an English marriage, between parties domiciled in England at the time of such marriage, is *null*. The point, however, with us must still be considered unsettled.

9. *What is the effect of a foreign judgment?*—118–121.

In cases not governed by the Constitution and laws of the United States, the doctrine of the English law on that subject is generally the law of this country: and there a distinction is taken between a suit brought to enforce a foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause. No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment; for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty. In the case of a suit to enforce a foreign judgment, the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or show that it was irregularly and unduly obtained. But if the foreign judgment has been pronounced by a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing party institutes a new suit upon the same matter, the plea of the former judgment is an absolute bar, provided the subject and the parties, and the grounds of judgment be the same. It is a *res judicata*, which is received as evidence of truth; and the *exceptio rei judicatæ*, as the plea is termed in the civil law, is final. This is a principle of general jurisprudence, founded on public convenience, and sanctioned by the usage and courtesy of nations.

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10. *What is the effect of a suit pending before another competent tribunal?*—122–125.

A *lis pendens* before the tribunals of another jurisdiction has, in proceedings *in rem*, been held to be a good plea in abatement of a suit. Thus, where a creditor of A, a bankrupt, had *bonâ fide* and by regular process attached in another State a debt due to A and in the hands of B, it has been held that the assignees of the bankrupt could not, by a subsequent suit, recover the debt of B. The pendency of the foreign attachment is a good plea in abatement of the suit. In such a case the equity of the maxim, *qui prior est tempore potior est jure*, forcibly applies. But, generally, a personal arrest and holding to bail in a foreign country can not be pleaded in abatement; and it is no obstacle to a new arrest and holding to bail for the same cause in the English courts, and they will not take judicial notice of any arrest in a foreign country, or in their own plantations; and the same rule of law has been declared in this country.

11. *When may a divorce* a mensa et thoro *be granted?*—125–128, *notes.*

The statute of New York authorizes the court to grant qualified divorces *a mensa et thoro*, founded on the complaint of the wife, of cruel and inhuman treatment, or such conduct as renders it unsafe and improper for her to cohabit with her husband; or for willful desertion of her, and refusal or neglect to provide for her. The court may grant the decree of separation for ever, or for a limited time, in its discretion, and the same court may revoke the decree at any time, under such regulations as it thinks proper, upon the joint application of the parties, and upon their producing satisfactory evidence of their reconciliation. These qualified divorces are allowed by the laws of almost all countries, and it is assumed that they prevail generally in the United States, in cases of extreme cruelty, though they are unknown in some of them, as, for instance, in New Hampshire, Connecticut, Ohio, Indiana and South Carolina. In Louisiana, the divorce *a mensa* leads to a divorce *a vinculo*, if the parties be not reconciled in two years. In Massachusetts, those divorces are allowed for extreme cruelty in either party, and in favor of the wife when the husband shall utterly desert her, or refuse or neglect to

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provide (if able) suitable maintenance for her. And by the laws of 1857 of that State, when parties have lived apart for five consecutive years after a divorce *a mensa*, a divorce *a vinculo* may be granted on the petition of the party obtaining the former divorce; and after a separation of ten years, such a divorce may be granted, under certain conditions, on the petition of either party. In Vermont, New Jersey, Kentucky, Mississippi, Tennessee, Alabama, and Michigan, divorces *a mensa et thoro* may be granted for extreme cruelty, and in some of these States for willful desertion for two years.

LECTURE XXVIII.

OF HUSBAND AND WIFE.

1. *What are the legal effects of marriage?*—129.

They are generally deducible from the principle of common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended, during the continuance of the matrimonial union. From this principle it follows, that at law no contracts can be made between the husband and wife, without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage are dissolved. The wife can not convey lands to her husband, though she may release her right of dower to his grantee; nor can the husband convey lands by deed to the wife without the intervention of a trustee; but the husband may devise lands to his wife, for the instrument is not to take effect until after his death; and by a conveyance to uses, he may create a trust in favor of his wife, and equity will decree a performance of the contract by the husband with his wife, for her benefit.

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2. *What is the general rule as to the rights and liabilities of the husband?*—129, 130.

That he becomes, upon the marriage, entitled to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts and perform her contracts.

3. *What common law right in the lands of his wife, does the husband acquire by marriage?*—130, 131.

If the wife, at the time of marriage, be seized of an estate of inheritance in land, her husband, upon the marriage, becomes seized of the freehold, *jure uxoris*, and he takes the rents and profits during their joint lives. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife or her heirs; and in all these cases, the emblements growing upon the lands at the termination of the husband's estate go to him or his representative.

4. *What right does the husband acquire in the life estate of his wife?*—134.

Upon the marriage, he becomes seized of such an estate in right of his wife, and is entitled to the profits during the marriage.

5. *What if she have an estate during the life of another person who survives her?*—134.

The husband becomes a special occupant of the land during the life of such other person.

6. *To whom does the land go after the estate for life is ended?*—134.

To the person entitled in reversion or remainder, and the husband, *quasi* husband, has no more concern with it. This estate the husband can only sell or charge to the extent of his interest in it, and his representatives take as emblements the crops growing at his death.

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7. *What rights has the husband in the chattels real of his wife?* —134.

Upon marriage, he becomes possessed of all the chattels real of his wife, as leases for years, and the law gives him power, without her, to assign, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime; except it be such an interest as the wife hath, by provision or consent of her husband, by way of settlement. Such chattels real are also subject to be sold under execution for his debts.

8. *What if he makes no disposition of them in his lifetime?*—134.

He can not devise the chattels real by will, and the wife, after his death, will take the same in her own right, without being executrix or administratrix to her husband. If he grant a rent charge out of the same, without altering the estate, the rent charge becomes void at his death.

9. *What property in her chattels real does the law give him, if he survive the wife?*—134.

It gives him her chattels real, absolutely by survivorship; for he was in possession of the chattels real during the coverture, by a kind of joint tenancy with the wife.

10. *What is the rule respecting the wife's* choses in action ?—135.

That the husband has power to sue for and recover the same; and when recovered, and reduced to possession, and not otherwise, the money becomes, in most cases, absolutely his own. The rule is the same, if a legacy or distributive share accrues to the wife during coverture. So, he has power to release and discharge the debts, and to change the securities, with the consent of the debtor.

11. *What if he dies before he has recovered the money or reduced the* chose in action *into possession?*—135.

The wife will be entitled to the property in her own right, without administering on his estate, or holding the same as assets for his debts.

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12. *What if the wife dies and he survives her, before he has reduced the* chose in action *into possession?*—135.

It does not strictly survive to him; but he is entitled to recover the same to his own use, by acting as her administrator. By the English statutes of distribution, which have been substantially reënacted in New York and the other States of the Union, the husbands of married women who die intestate have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute it has been held that the husband is entitled, *jure mariti*, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced into possession, or contingent, or recoverable by suit.

13. *What is the rule as to the wife's debts* dum sola?—135, 136.

That if the wife leaves *choses in action* not reduced into possession during her life, the husband will be liable to that extent; for those *choses in action* will be assets in his hands. It is also settled, that if the husband, who has survived his wife, dies before he has recovered the *choses in action*, his representatives are entitled to that species of property.

14. *What is the rule where the husband has administered in part on his wife's estate, and dies, and administration* de bonis non *of the wife, by a third person or by the next of kin of the wife, is obtained?*—136.

That such administrator would be deemed as a mere trustee for the representatives of the husband.

15. *What if a suit be brought in the joint name of husband and wife to recover the wife's* chose in action, *and he die before he has reduced the property to possession?*—138.

The wife as survivor would take the benefit of recovery; and it is settled that in a suit in chancery, by the husband, to recover a legacy, or distributive share due the wife, she must be made a party with him, and then the court will require the husband to make a suitable provision for the wife out of the property.

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16. *How does a general assignment in bankruptcy, or under the insolvent laws, affect the wife's property?*—138.

It passes her property and *choses in action*, but subject to her right of survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other.

17. *What is the rule in chancery as to the wife's equity to a reasonable provision out of her property, for the support of herself and her children?*—139–141.

That if the husband wants the aid of chancery to enable him to get possession of his wife's property, he must do what is equitable, by making a suitable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. The provision is to be apportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. And it is settled that the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, lying in action, extends not only to property which she owned while unmarried, but to property descended or devised to her while married. But the wife's equity does not attach, except upon that part of her personal property in action which the husband can not acquire without the assistance of a court of equity. And the rule in equity does not controvert the husband's legal title to his wife's personal fortune; if he once acquired possession of that property *jure mariti*, though it should have been of an equitable nature, chancery will leave him in undisturbed possession of it.

18. *What is the difference as to* choses in action *belonging to the wife, when the husband sues in his own name exclusively, or jointly with his wife?*—142.

The principle of the distinction is, that if he brings the ac-

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tion in his own name alone, it is a disagreement to the wife's interest, and implies it to be his intention that it should not survive her. But if he brings the action in their joint names, the judgment is, that they shall both recover, and the debt survives to the wife. The judgment does not alter the property, nor show it to be his intention that it should be altered.

19. *What is the rule of equity in case the husband has made a marriage settlement on his wife, in consideration of her fortune?*—142.

He is considered in the light of a purchaser of her fortune, and his representatives will be entitled, on his dying in his wife's lifetime, to the whole of her property lying in action, though not reduced to possession in his lifetime, and though there be no special agreement for that purpose.

20. *What is the rule as to the personal property of the wife, which she had in possession at the time of the marriage?*—143.

That which she had in her own right, and not *en autre droit*, such as money, goods and chattels, and movables, vests immediately and absolutely in the husband, and on his death they go to his representatives, as being entirely his property.

21. *What is the rule as to the liability of the husband for the wife's debts?*—143, *n.* 1.

That he is liable for all her debts before coverture; but if they are not recovered during the coverture, he is discharged. And this is a strict rule of law. In New York, by statute, passed July 18th, 1853, suits to recover debts contracted by the wife before marriage may be brought against husband and wife; but the judgment and execution affect the separate estate of the wife only. A husband, however, who acquires the separate property of his wife, is liable to the extent of such property for her debts contracted before marriage.

22. *How far is the husband liable for the contracts of his wife during coverture?*—146, *and notes.*

The husband is bound to provide his wife with necessaries suitable to his condition in life; and if she contracts debts due

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for them during cohabitation, he is obliged to pay those debts; but for any thing beyond necessaries he is not chargeable. He is bound by her contracts for ordinary purchases, from a presumed assent on his part; but if his dissent be previously made known, the presumption of his assent is rebutted. He may still be liable, though the seller would be obliged to show, at least, the absolute necessity of the purchase for her comfort. If the tradesman furnish goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with her husband; though, on this point, there are conflicting decisions. Nor is he liable for money lent to the wife, unless his request be averred and shown. So, if the husband makes a reasonable allowance to the wife for necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable, unless the tradesman can show that the allowance was not supplied. If the husband abandons his wife, without any provision for her maintenance, or if he sends her away, he is liable for her necessaries, and he sends credit with her to that extent. In Pennsylvania, it has been held that where the husband, after an amicable separation, furnishes necessaries according to agreement, he is not liable for articles furnished by a tradesman, even though he had no notice; for the moral obligation of the husband ceases. But if the wife *elope*, though it be not with an adulterer, he is not chargeable even for necessaries. The very fact of elopement and separation is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. The husband is not liable unless he receives his wife back again. The duties of the wife, while cohabiting with the husband, form the consideration of his liability. He is, accordingly, bound to provide for her in his family; and while he is not guilty of cruelty, and is willing to provide her a home, and all reasonable necessaries there, he is not bound to furnish them elsewhere.

23. *What is the rule where the wife elopes, and repents and returns again, and her husband refuses to receive her?*—147–149.

That he is bound for her necessaries; but it does not apply where the wife had committed adultery. If a man turns away his wife without justifiable cause, he is bound by her contracts

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for necessaries suitable to her degree and estate, but the party furnishing necessaries must, according to a New York decision, prove that the wife left for sufficient cause. If they live together, he is bound only by her contracts made with his assent, which may be presumed. If the wife goes beyond what is reasonable and prudent, the tradesman trusts her at his peril.

24. *How far is the husband liable for the torts and frauds of the wife committed during the coverture?*—149, 150.

If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with her husband. Where the remedy for the tort is only damages by suit, or fine, the husband is liable with the wife; but if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment. The wife, during coverture, can not be taken on a *ca. sa.*, for her debt *dum sola*, or a tort *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone. If the tort or offense be punished criminally, by imprisonment, or other corporal punishment, the wife alone is to be punished, unless there be evidence of coercion, from the fact that the offense was committed in the presence, or by the command of the husband. This indulgence is extended so far as to excuse the wife from punishment for theft committed in the presence, or by the command of her husband. But the coercion which is supposed to exist in that case is only a presumption of law, and, like other presumptions, may be repelled.

25. *What are the exceptions to the general rule of law, that the wife is incompetent to contract?*—150–154.

1. A wife may purchase an estate in fee without her husband's consent, and the conveyance will be good, if the husband does not avoid it by some act declaring his dissent, and the wife, after her husband's death, may waive or disagree to the purchase. And a wife in England, and those States in this country where fines exist, may pass her freehold estate by a fine, and this and a common recovery were the only ways in which she could, at common law, convey her real estate. She may, by a fine, and a declaration of the uses thereof, declare a use for her husband's

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benefit. So, if the husband and wife levy a fine, a declaration of the uses by the husband alone will bind the wife and her heirs, unless she disagrees to the uses during the coverture. As a general rule, the wife must be a party with her husband to the conveyance, but if she levy a fine as a *feme sole*, without her husband, though it will be good as against her and her heirs, the husband may avoid it during coverture, for the benefit of the wife, as well as for himself. Now the English law is changed as to the mode of conveyance by the wife, by the abolition of fines and recoveries, and the wife conveys by deed, with her husband's concurrence. The wife may, as an attorney to another, convey an estate in the same manner as her principal could, and she may execute a power simply collateral, and, in some cases, a power coupled with an interest, without the concurrence of her husband. She may also transfer a trust estate, by lease and release, as a *feme sole*. The general rule of our American law is, that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party; and that the cases in which her deed without such concurrence is valid, are to be exceptions to the general rule.

2. If the husband was banished, or had abjured the realm, it was an ancient and another necessary exception to the general rule of the wife's disability to contract, and if the husband be an alien living abroad, the reason of the exception also applies.

26. *How is the rule of law, that a woman can not hold personal property, independent of her husband, taken in equity?*—162–164.

It is not received in equity, and a married woman may, through the medium of a trustee, enjoy property as freely as a *feme sole;* and it is not unusual to convey or bequeath property to a trustee, in trust to pay the interest or income thereof to the wife to her separate use, free from the debts of her husband, and payable upon her separate order or receipt, and, after her death, in trust for her issue. In such case, the husband has no interest in the property, though after the interest is actually received by the wife, it then might be considered as part of the husband's personal property. It is not necessary that the trustee should be a stranger. The husband himself may be trustee; and if

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no trustee be appointed, chancery will protect her interest. Gifts from the husband to the wife may be supported, as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. She may institute a suit by her next friend, against him, and she may obtain an order to defend separately suits against her; and when compelled to sue her husband in equity, the court may order him to make her a reasonable allowance in money to carry on the suit.

27. *What are the cases in which equity allows a wife to institute a suit against her husband?*—164.

When any thing is given to her for her separate use, or her husband refuses to perform marriage articles, or articles for a separate maintenance; or where the wife, being deserted by her husband, hath acquired by her labor a separate property, of which he hath plundered her. The acquisitions of the wife, in such a case, are her separate property, and she may dispose of them by will or otherwise. It is the settled rule in equity that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind such separate estate.

28. *Is a married woman bound by her covenants?*—168.

The doctrine that the wife can be held bound to answer in damages after her husband's death, on her covenant of warranty, entered into during coverture, is not considered by the courts of this country to be law; and it is certainly contrary to the settled principles of the common law, that the wife was incapable of binding herself by contract. In the Supreme Court of Massachusetts, it has been repeatedly held that a wife was not liable on the covenants in her deed, further than they might operate by way of estoppel; and though the question in these cases arose while the wife was still married, yet the objection went to destroy altogether the effect of the covenant. The agreement of a *feme covert*, with the assent of her husband, to sell her estate, is absolutely void at law, and the courts of equity never enforce such a contract against her. The chancery jurisdiction is applied to the cases of property settled to the separate use of the wife by deed or will, with a power of appointment, and rendered subject to her disposition.

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29. *Can a married woman make a will?*—170, 171.

A wife can not devise her lands by will, for she is excepted out of the statute of wills; nor can she make a testament of chattels, except it be of those which she holds *en autre droit*, or which are settled on her as her separate property without the license of her husband. She may dispose, by deed or will, of her separate personal estate, or of the savings of her real estate settled to her separate use. And where an estate is limited to uses, and a power is given to a *feme sole* before marriage to declare those uses, such limitation of uses may take effect, and she may devise by way of execution of the power, and whoever takes under the will, takes by virtue of the power.

30. *What is the rule with respect to antenuptial agreements?*—172–174.

That equity will grant its aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and policy of the law. Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of collateral relations.

Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against purchasers and creditors. The marriage is, of itself, a valuable consideration for the agreement, and sufficient to give validity to the settlement. And if a person be not indebted at the time, a post-nuptial voluntary settlement upon his wife or children, if made without any fraudulent intent, is valid against subsequent creditors; and such a settlement between husband and wife may be good, provided the settlor has received a fair and reasonable consideration in value for the thing settled, so as to repel the presumption of fraud.

If a wife, previously to marriage, makes a settlement of either her real or personal estate, it is a settlement in derogation of the marital rights, and it will depend upon circumstances whether it will be valid.

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31. *What is the rule as to the right of the husband or wife to be a witness for or against each other?*—178–180.

It is a settled principle of law, founded on public policy, that the husband and wife can not be witnesses either for or against each other. Nor can either of them be permitted to give any testimony either in a civil or criminal case, which goes to criminate the other; and the rule is so inviolable, that no consent will authorize the breach of it. But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge him. Dying declarations of the wife have been admitted in a civil suit against her husband, and for the security of the peace, *ex necessitate*, the wife may make an affidavit against her husband. These are the only exceptions to the rule.

32. *What authority may the husband exercise over the person of his wife?*—181.

As he is guardian of the wife, and is bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce. The husband is the best judge of the wants of the family and the means of supplying them, and if he shifts his domicil the wife is bound to follow him wherever he chooses to go.*

* The answers in the above (28th) lecture have been framed without reference to the recent legislation of several States in which the relations of husband and wife, as regards the property of the latter, have been essentially changed. In Vermont, Connecticut, New York, Texas, Maine, New Jersey, Georgia, and other States, laws have been enacted enlarging the rights of married women over their property, but these statutes are too numerous to allow of even an abridgment of them being presented here.

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LECTURE XXIX.

OF PARENT AND CHILD.

1. *In what do the duties of parents to their children, as their natural guardians, consist?*—189.

In maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.

2. *How far is the parent bound by law to provide for the child?*—190–195, *and notes.*

He is bound to provide reasonably for the maintenance and education of his minor children, and he may be sued for necessaries furnished and schooling given to a child, under just and reasonable circumstances. What is necessary for the child is left to the discretion of the parent; and where the minor is *sub potestate parentis*, there must be a clear omission of duty as to necessaries, before a third person can furnish them and charge the father. And it will always be a question for a jury, how far, under the circumstances, the father's authority was to be inferred. The obligation of the father to maintain his child ceases as soon as the child comes of age, however wealthy the father may be, and the husband is not liable for the expenses of the maintenance of the child of the wife by a former husband, nor for the expense of the maintenance of the wife's mother. If, however, he takes the wife's child into his own house, he is then considered as standing *in loco parentis*, and is responsible for the maintenance and education of the child so long as it lives with him. The father is, generally, entitled to the custody of the persons of his children and the value of their labor during their minority. He may also maintain trespass for a tort to an infant child, provided he can show a loss of services, for that is the *gist* of the action by the father.

In England, the duties of the parent were regulated by statutes of 43 Elizabeth and 5 George I., which extended to

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grand-parents and grand-children reciprocally, and these statutes have been followed or reënacted with modifications in most of the States. The Revised Statutes of New York and Massachusetts speak only of parents and children, and by the laws of New York of 1850, the parent must notify a minor's employer, within thirty days after commencement of service, that he claims the wages, or payment to the minor will be good.

Statutory provision has also been made in New York for the support by parents, when able, of adult children not able to maintain themselves and becoming chargeable to any city or town. Where minor children have property of their own, the courts now look with great liberality to the peculiar circumstances of each case, and to the respective estates of the father and children; and in one case where the father had a large income, he was allowed for the maintenance of his infant children who had a still larger income.

3. *What are the rights of parents in addition to those mentioned in the last answer?*—203–207.

The rights of parents result from their duties, and the law empowers them to exercise such discipline as may be requisite for the discharge of this sacred trust. The father (and, on his death, the mother) is generally entitled to the custody of infant children, but the courts of justice may in their sound discretion, and when the morals, safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place them elsewhere. The parent, or one *in loco parentis*, may, under certain circumstances, maintain an action for the seduction of his daughter. And generally in this country, the father may by deed or will dispose of the custody and tuition of his infant children; if there be no such disposition, the mother is entitled, after the father's death, to their guardianship.

4. *What are the duties of children to their parents?*—207.

Obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives; but the common law has provided no means of enforcing these natural obligations. The statute law of New York compels children

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(being of sufficient ability) of poor, old, lame or impotent persons (not able to maintain themselves), to relieve and maintain them.

5. *How does the law consider an illegitimate child?*—212–216.

A bastard, being in the eye of the law, *nullius filius*, or as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelligitur*, he has no inheritable blood, and is incapable of inheriting as heir, either to his putative father or his mother, or any one else, nor can he have heirs but of his own body. Bastards are incapable of taking in New York under the law of descents or the statute of distributions, and this, the rule of the English law, is followed in many of the other States. But in Vermont, Connecticut, Virginia, Kentucky, Ohio, Indiana, Missouri, Illinois, Tennessee, North Carolina, Alabama, and Georgia, bastards, under certain modifications, inherit and transmit real and personal estate from and to their mothers; and in New York, the estate of an intestate bastard descends to the mother, and the relatives on the mother's side. In Massachusetts, Pennsylvania, and Maine, bastards are rendered legitimate to all intents and purposes by the intermarriage of their parents and recognition by the father; and in North Carolina, the Legislature enabled bastards to be legitimated on the marriage of the parents, or, in some cases, on the petition of the father, so as to enable the child to inherit the estate of the father. The mother or reputed father is generally, in this country, chargeable by law with the maintenance of bastard children, and the mother has a right to their custody as against the putative father, though perhaps he might assert the right as against a stranger.

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LECTURE XXX.

OF GUARDIAN AND WARD.

1. *How many kinds of guardianship are there?*—220.
There are two; one by common law and one by statute.

2. *How many kinds of guardianship were there at common law?*—220.
Three; viz., guardian by nature, guardian by nurture, and guardian in socage.

3. *Who is guardian by nature?*—220.
The father.

4. *If the father died, who was the guardian?*—220.
The mother.

5. *How far does this guardianship extend?*—220.
It extends only to the custody of the person of the child, until the age of twenty-one years, and it yielded to guardianship in socage.

6. *When does guardianship by nurture occur?*—221.
Only when the infant is without any other guardian, and it belongs exclusively to the parents, first to the father, and then to the mother. It extends only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. This guardianship is said to apply only to younger children, who are not heirs apparent; and as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete. As it was concurrent with guardianship by nature, it is in effect merged in the higher and more durable title of guardian by nature.

7. *What authority has the guardian in socage?*—222.
He has the custody of the infant's lands as well as his per-

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son. It applies only to lands which the infant acquires by descent; and the common law gave this guardianship to the next of blood to the child, to whom the inheritance could not possibly descend; and therefore, if the land descended to the heir on the part of the father, the mother, or next relation on the part of the mother, had the wardship; and so if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship.

8. *When do guardians in socage cease?*—222.

When the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, who is then accountable to the heir for the rents and profits of the estate.

9. *What if the infant does not elect a guardian?*—222–224.

The guardian in socage continues. But the guardianship may be considered as gone into disuse, and can hardly exist in this country; for the guardian must be some blood relation who can not possibly inherit, and such a case can rarely exist. In New York, where an estate becomes vested in an infant, the guardianship, with the rights of a guardian in socage, belong by law to the father; if there be no father, to the mother; if there be no mother, then to the nearest and eldest relative of full age, not being under any legal incapacity; and as between relatives of the same degree of consanguinity, males are preferred. But the rights of such guardian are superseded when a guardian is appointed by deed or will of the infant's father, or, in default thereof, by the surrogate of the county where the minor resides.

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10. *How are testamentary guardians appointed?*—224, 225.

By the deed, or last will of the father, and they supersede the claims of any other guardian, extend to the person and estate of the child, and continue until he arrives at full age. It is a personal trust and is not assignable.

11. *Who are chancery guardians?*—227.

Guardians appointed by the Court of Chancery, or other tribunals, having jurisdiction in testamentary matters. The

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chancery guardian continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen. If there be no testamentary guardian, surrogates and judges of probate have generally power to appoint a guardian in as ample a manner as the chancellor, and on due cause to remove him and appoint another in his stead.

12. *In whom does the general jurisdiction over guardians reside?* —227.

In the Court of Chancery. They may be cited and compelled to appear before the surrogate, but his powers are not exclusive. A guardian appointed by the surrogate or by will is as much under the control of chancery, and of the power of removal by it, as if he were appointed by the court.

13. *What is the practice in chancery on the appointment of a guardian?*—227.

The practice is to require a master's report approving of the person and security offered. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate; in like manner, as in cases of lunatics and idiots, there may be one committee of the person, and another of the estate. The guardian or committee of the estate always is required to give adequate security, but the committee of the person gives none.

14. *What are the legal responsibilities of a guardian to his ward?* —229–231.

His trust is one of obligation and duty, and not of speculation and profit. He can not reap any benefit from the use of his ward's money. He can not act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. He is liable to an action of account at common law, by the infant, after he comes of age; and the infant, while under age, may, by his next friend, call the guardian to account by a bill in chancery. Every guardian is bound to keep safely the real and personal estate of his ward, and to account for the personal estate,

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and for the issues and profits of the real estate; and if he suffers any waste, sale or destruction of the inheritance, he is liable to be removed, and to answer in treble damages. If the guardian has been guilty of negligence in the keeping or disposition of the infant's funds, whereby the estate has incurred a loss, the guardian will be obliged to sustain that loss. If the guardian puts the ward's money in trade, the ward will be entitled to elect to take the profits of the trade, or the principal, with compound interest, to meet those profits when the guardian will not disclose them. So, if he neglects to put the ward's money at interest, but negligently suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and in cases of gross delinquency, with compound interest. These principles apply to trustees of every kind.

LECTURE XXXI.

OF INFANTS.

1. *From what does the necessity of guardians result, and how long does this inability continue in contemplation of law?*—232–234.

It results from the inability of infants to take care of themselves; and it continues in contemplation of law, until the infant has attained the age of twenty-one years. The age of twenty-one is the period of majority for both sexes, according to the English common law, and that age is completed on the day preceding the anniversary of the person's birth. The age of twenty-one is probably the period of absolute majority throughout the United States, though female infants, in some of them, have enlarged capacity to act at the age of eighteen. In Vermont and Ohio, females are deemed of full age in respect to contracts, at the age of eighteen. Louisiana and France follow in this respect the common law period of limitation, though entire majority by the civil law, as to females as well as males, was not until the age of twenty-five; and Spain and Holland follow, as to males, the rule of the civil law. Nor can infants do any act

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to the injury of their property, which they may not avoid, or rescind, when they arrive at full age. The responsibility of infants for crimes by them committed, depends less on their age, than on the extent of their discretion and capacity to discern right and wrong.

2. *Which of an infant's acts are void, and which voidable?*—234–238.

Most of the acts of infants are voidable only; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done and contracts made in infancy; but the precise line of distinction is difficult to ascertain. If his deed or contract be voidable only, it is nevertheless binding on the adult with whom he dealt, so long as it remains executory, and is not rescinded by the infant; it is also a rule that no one but the infant or his legal representatives can avoid his voidable deed or contract. The books appear to leave the question in some obscurity, when and to what extent a positive act of confirmation on the part of the infant is necessary. The English cases seem to place the infant's exemption on his repudiation of the contract within a reasonable time after his attaining majority, while the American cases seem to decide that his contract is not binding unless there be some act on his part, after arriving at the age of twenty-one years, showing an intention to ratify. The suitable course to be adopted by a person who does not mean to stand by a contract made in infancy, is to disaffirm it by some act equally solemn with that by which the contract was originally made.

3. *What acts are binding on infants?*—239.

Contracts for necessaries are binding upon an infant, and he may be sued and charged in execution on such a contract, provided the articles were necessary for him under the circumstances and condition in which he was placed.

4. *How is the question of necessaries governed?*—239, *and note* 2.

By the real circumstances of the infant, and not by his ostensible situation; and, therefore, the tradesman who trusts him is bound to make due inquiry, and if the infant has been

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properly supplied by his friends, the tradesman can not recover. Lord Coke considers the necessaries of the infant to include victuals, clothing, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards." What subjects of expenditure are necessaries, has been declared to be a question for the court; and whether any and how much were required, for the jury.

5. *If the infant lives with his father, or guardian, and their care and protection are duly exercised, can he bind himself even for necessaries?*—239.

He can not.

6. *Is infancy permitted to protect fraudulent acts?*—240, 241.

No, it is not; and therefore, if an infant takes an estate, and agrees to pay rent, he can not protect himself from the rent, by pretense of infancy, after enjoying the estate when of age. If he receives rents, he can not demand them again when of age, according to the doctrine as now understood. If an infant pays money on his contract, and he enjoys the benefit of it, and then avoids it when he comes of age, he can not recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, not as a sword. He can not have the benefit of the contract on one side, without returning the equivalent on the other. But there are many hard cases in which the infant can not be held bound by his contracts, though made in fraud; for infants would lose all protection if they were to be bound by their contracts made by improper artifices, in the heedlessness of youth, before they had learned the value of character, and the just obligation of moral duties. Where an infant had fraudulently represented himself to be of age when he gave a bond, it was held that the bond was void at law. But where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided payment of the price of the goods, on the plea of infancy, the vendor was held entitled to reclaim the goods, as having never parted with his property in them; and it has been suggested, in another case

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that there might be an instance of such gross and palpable fraud, committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him. Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault; or constructive torts, or frauds. But the fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, can not be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action. He is liable in trover for tortiously converting goods intrusted to him; and in detinue, for goods delivered upon a special contract for a specific purpose; and in *assumpsit*, for money, which he has fraudulently embezzled.

7. *What other acts has an infant capacity to do?*—242, 243, *and notes.*

He may bind himself as an apprentice. The weight of opinion is that a male infant may devise chattels, at the age of fourteen, and a female, at the age of twelve. By the New York statutes, eighteen in males, and sixteen in females, is the age at which they can make a will of chattels. A general rule is, that whatever an infant is bound to do at law, the same will bind him if he does it without suit at law; and if he does a right act, which he ought to do, and which he was compellable to do, it shall bind him. And in consequence of the capacity of infants to contract marriage at the age of consent, their marriage settlements, when reasonable, have been held valid in chancery, but it has long been an unsettled question whether a female infant could bind her real etate by a settlement upon marriage.

8. *If an infant be made a defendant in equity, at the suit of a creditor, will the answer of the guardian* ad litem *be binding or conclusive?*—245.

No, it will not.

9. *How will such an answer in chancery,* pro forma, *leave the plaintiff?*—245.

It leaves the plaintiff to prove his case, and throws the infant upon the protection of the court.

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10. *What was the maxim of the Roman law in this respect?*—245.

It was the maxim of the Roman law, that an infant was never presumed to have done an act to his prejudice, *pupillus pati posse non intelligitur*. In decrees of foreclosure against an infant there is, according to the old and settled rule of practice in chancery, a day given when he comes of age, usually six months, to show cause against the decree, and make a better defense, and he is entitled to be called in for that purpose by process of *subpœna*. The decree in ordinary cases would be bad *on the face of it*, and ground for a bill of review, if it omitted to give the infant a day to show cause after he came of age; though Lord Redesdale held that such an error in the decree would not affect a *bona fide* purchase at a sale under it. But in the case of decrees for the foreclosure and sale of mortgaged premises, or for the sale of lands under a devise to pay debts, the infant has no day, and the sale is absolute. In the case of a strict foreclosure of the mortgagor's right without a sale, the infant has his day after he comes of age, but then he is confined to showing errors in the decree, and can not unravel the accounts, nor redeem.

LECTURE XXXII.

OF MASTER AND SERVANT.

1. *What are the several kinds of persons that come within the description of master and servant?*—246.

1. Slaves. 2. Hired servants. 3. Apprentices.

2. *How, according to the Institutes of Justinian, might a person become a slave?*—246.

In three ways: 1. By birth, when the mother was a slave. 2. By captivity in war. 3. By the voluntary sale of himself as a slave, by a freeman, above the age of twenty, for the purpose of sharing the price.

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3. *How is the relation of master and servant of the second class formed?*—258.

By contract. The one is bound to render service, and the other to pay a stipulated consideration. But if the servant, hired for a definite period, leaves the service before the end of it, without reasonable cause, or is dismissed for justifiable cause, he loses his right to wages for the period he has served.

4. *For what cause may a servant be dismissed?*—259.

Either for immoral conduct, willful disobedience, or habitual neglect.

5. *What is the rule with respect to the obligation of the master for the acts and contracts of his servant?*—259, 260, *and notes.*

That the master is bound by the act of his servant, either in respect to contracts or injuries, when the act was done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of his master, the master, as well as the servant, has been held liable in damages; and he is also said to be liable if the injury proceeds from negligence, or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skillful and careful. The master is only amenable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which, when he commits, he steps out of the course of the service to do. Thus, it has been decided that the master is not liable in trespass for the willful act of his servant, in driving his master's carriage against another. In New York and Illinois special statutes have been passed making the master liable for the acts, willful or otherwise, of his servant while driving a carriage.

6. *What is the rule as to liability of the master, if the servant employs another servant to do his business?*—260.

If the servant so employed be guilty of an injury, the master is liable. But to render this rule applicable, the nature of the business must be such as to require the agency of subordi-

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nate persons, and then there is an implied authority to employ such persons. A servant may justify a battery in the necessary defense of his master.

7. *What persons come under the description of apprentices?*—261–266.

Persons who are bound to service for a term of years to learn some art or trade. They are the subject of statute regulations in almost, if not quite, every State in the Union, or perhaps in Europe.

It is declared by the statute law of New York, which may be taken for a sample, in most parts, of the law in several of the States, that infants, if males, under twenty-one, and if unmarried females, under eighteen years of age, may be bound by indenture, by their own free act, with the consent of their father, mother, guardian or testamentary executor, or by the overseer of the poor, two justices, or a judge, to a term of service as apprentice in any profession, trade or employment, until the age of twenty-one years, if a male, or eighteen if a female, or for a shorter time. In all indentures by officers, binding poor children, a covenant must be inserted to teach them to read and write, and, if a male, general arithmetic. For refusal to serve and work, infants are liable to be imprisoned until they shall serve as such apprentices; and also to serve double the time they had withdrawn from service, provided the same does not extend beyond three years next after the end of the original term of service. They are also liable to be imprisoned in some house of correction, not exceeding one month, for ill-behavior or any misdemeanor. Infants coming from beyond the sea may bind themselves to service. Grievances of either master or apprentice are to be redressed at the general sessions of the peace, or before two justices of the peace, who have power to annul the contract, discharge the apprentice, or imprison him if in the wrong. And no person shall make any agreement with an apprentice preventing him, on expiration of his term, from setting up his trade, profession or employment in any particular place.

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LECTURE XXXIII.

OF CORPORATIONS.

1. *What is a corporation?*—267.

A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual.

2. *What is the object of this institution?*—267.

To enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law but as one moral person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a variety of political and civil rights. One of the peculiar properties of a corporation, is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of a corporation do not determine, or vary, upon the death or change of any individual members. They continue as long as the corporation endures.

3. *What is meant by saying that a corporation is immortal?*—268.

The immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal, that it is well known that most of the private corporations recently created by statute are limited in duration to a few years. There are many corporate bodies that are without limitation, and consequently capable of continuing so long as a succession of individual members of the corporation remains and can be kept up.

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4. *For what purpose were corporations invented?*—268.

It was chiefly for the purpose of clothing bodies of men in succession, with the qualities and capacities of one single, artificial, and fictitious being, that they were originally invented, and, for the same convenient purpose, they have been brought largely into use. By means of the corporation, many individuals are capable of acting in perpetual succession like one single individual, without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity.

5. *How far back may we trace the history of corporations?*—268, 269.

They were well known to the Roman law, and they existed from the earliest periods of the Roman republic. It would appear from a passage in the Pandects, that they were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to public law. But the Romans were not so indulgent as the Greeks. They were very jealous of such combinations of individuals, and they restrained those that were not specially authorized; and every corporation was illicit that was not ordained by the decree of the senate or of the emperor. In the age of Augustus, as we are informed by Suetonius, certain corporations had become nurseries of faction and disorder, and that emperor interposed, as Julius Cæsar had done before him, and dissolved all but ancient and legal corporations. We find, also, in the younger Pliny, a singular instance of the extreme jealousy indulged by the Roman government of these corporations. A destructive fire in Nicomedia induced Pliny to recommend to the Emperor Trajan the institution, for that city, of a fire company of one hundred and fifty men (*collegium fabrorum*), with an assurance than none but those of that business should be admitted into it, and that the privileges granted them should be extended to no other purpose. But the emperor refused the grant, and observed, that societies of that sort had greatly disturbed the peace of the cities; and that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail te be mischievous.

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6. *What do the powers, capacities, and incapacities of corporations, considered under the English law, resemble?*—269.

They very much resemble those under the civil law; and it is evident that the principles of law applicable to corporations under the former, were borrowed chiefly from the Roman law, and from the policy of the municipal corporations established in Britain and the other Roman colonies, after these countries had been conquered by the Roman arms. Under the latter system, corporations were divided into ecclesiastical and lay, civil and eleemosynary.

7. *Under what disabilities were corporations placed under the Roman law?*—269, 270.

They could not purchase, or receive donations of land, without license, nor could they alienate without just cause. They could only act by attorney; and the act of the majority bound the whole; and they were dissolved by death, surrender, or forfeiture.

8. *When did corporations for the advancement of learning come into use?*—270.

Not until about the thirteenth century, though they may be said to have existed in an imperfect form at a much earlier period.

9. *About what time were civil or municipal corporations established in Europe, for political and commercial purposes?*—271.

Cities, towns, and fraternities were invested with corporate powers and privileges, and with a large share of civil and criminal jurisdiction, in the early periods of the history of modern Europe. These immunities were sought after from a spirit of liberty as well as of monopoly, and created as barriers against feudal tyranny. They afforded protection to commerce and the mechanical arts, and formed some counterpoise to the exorbitant power and unchecked rapacity of the feudal barons. By this means, order and security, trade and the arts revived in Italy, France, Spain, Germany, Flanders, and England. But although corporations were found to be very beneficial in the earlier periods of modern European history, in keeping alive the spirit of lib-

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erty, and in sustaining and encouraging the efforts for social and intellectual improvement, their exclusive privileges have too frequently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry. Adam Smith does not scruple to consider them, throughout Europe, as generally injurious to the freedom of trade, and the progress of improvement. The propensity in modern times has, however, been to multiply civil corporations, especially in the United States, where the demand for charters of incorporation is not merely for municipal purposes, but usually with the object of assisting individuals in their joint stock operations and enterprising efforts, directed to the business of commerce, manufactures, and the various details of internal improvement.

10. *What is the relation usually existing between corporations and the government creating them?*—272, *and notes.*

Acts of incorporation are contracts between the government and the company, which can not ordinarily be affected by legislative interference; and it has accordingly been attempted to retain a control over private corporations in the State of New York by a clause, now usually inserted in the acts of incorporation, that "it shall be lawful for the Legislature, at any time hereafter, to alter, modify or repeal the act." In Massachusetts, there is a standing provision that all acts of incorporation shall be liable to alteration or repeal at the discretion of the Legislature, unless there be in the act an express provision to the contrary; and similar provisions exist in Connecticut and Vermont. In Louisiana, the duration of corporations is limited to twenty-five, and in North Carolina to thirty years, unless specially provided otherwise. C. C. 296.

11. *How are corporations divided in the United States?*—173.

Into aggregate and sole.

12. *What is a corporation sole?*—273.

It consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he can not have. A bishop, dean, parson, and vicar,

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are given in the English books as instances of sole corporations. There are instances in this country of a minister of a parish, seized of parsonage lands in the right of his parish, being a sole corporation, and of county and town officers created sole corporations by statute. The word "successors" is generally as necessary for the succession of property in a corporation sole, as the word "heirs" is to create an estate of inheritance in a private individual.

13. *What are corporations aggregate?*—274.

The union of two or more individuals in a body politic, with capacity of succession and perpetuity. A fee will pass to a corporation aggregate without the word successors in the grant, it being a body in its nature perpetual.

14. *What kind of corporations are most in use?*—274.

Aggregate corporations are most in use with us.

15. *What is meant by ecclesiastical corporations?*—274.

They are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us they are called religious corporations.

16. *How are lay corporations divided?*—274.

Into eleemosynary and civil.

17. *What is an eleemosynary corporation?*—274.

It is a private charity, constituted for the perpetual distribution of alms. In this class may be ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning, and endowed with property by public and private donations.

18. *How are civil corporations divided?*—275.

Into private and public.

19. *What are public, and what private, corporations?*—275.

Public corporations are such as are created by government

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for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the State. A bank created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So is a hospital created and endowed by the government for general purposes. But a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature, and though the government may become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike and railroad corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. If the foundation of an institution be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution.

20. *How are corporations created?*—276.

In England, by prescription, royal charter, or act of Parliament. With us, they are created by authority of the Legislature; they may also exist in this country by prescription, which presupposes a grant.

21. *What are the ordinary powers of a corporation?*—277, 278.

1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise. 2. To sue and be sued, and to grant and receive by their corporate name. 3. To purchase and hold lands and chattels. 4. To have a common seal. 5. To make by-laws for the government of the corporation. 6. The power of amotion, or removal of members.

22. *What are* quasi *corporations?*—278.

Persons who are invested with a corporate capacity for particular specified ends, but who can in that capacity sue and be sued as an artificial person. Thus, for instance, in New York, overseers of the poor, commissioners of highways, trustees of

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common schools and others are invested with corporate attributes *sub modo.*

23. *Are the statutes of mortmain in force in this country?*—283.

They are in Pennsylvania. In the other States it is understood that they have not been reënacted or practiced upon, and the inference from the statutes creating corporations and authorizing them to hold lands to a certain limited extent is, that our statute corporations can not take and hold real estate for purposes foreign to their institution.

24. *Can corporations take lands by devise?*—285.

They are excepted out of the statutes of wills in England and in New York, and in most of the other States. C.C. 12/57

25. *What is now the general rule as to the power of corporations to make contracts?*—289–292.

It was decided* by the Supreme Court of the United States that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorized agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises for the enforcement of which an action lay. But corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority.

26. *By what name must corporations take and grant?*—292.

By their corporate name; but a misnomer will not invalidate a grant by or to a corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments.

27. *Can the majority of a corporation bind the whole?*—295.

As a general rule, if the act is to be performed by the constituent members, a majority of those who appear at a regular

* 7 Cranch, 299.

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corporate meeting may act ; but if the corporate act is to be done by a select and definite body, as by a board of directors, a majority of the definite body must be present, and then a majority of the quorum may decide.

28. *What of the power to make by-laws ?*—296.

It must be exercised reasonably, and in sound discretion, and strictly within the limits of the charter, and in subordination to the Constitution and general law of the land, and the rights dependent thereon.

29. *What of the power of amotion ?*—297.

It has been decided* that this power is as incident to and necessary for corporate bodies, as the power of making by-laws. But it must be exercised for good cause, and for some offense that has an immediate relation to the duties of the party as a corporator.

30. *Is there a difference between disfranchisement and amotion ?* —298.

Yes ; the former applies to members, and the latter only to officers ; and if an officer be removed for good cause he may still continue a member of the corporation.

31. *What is the modern doctrine respecting corporate powers ?*— 298, 299.

It is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and not as having any other. The Supreme Court of the United States declared this obvious doctrine, and it has been repeated by the decisions of the State courts.

32. *Where does the right of visitation of corporations lie ?*—300 -304.

The visitation of civil corporations is by the government it-

* 1 Burr. Rep., 517.

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self, through the medium of the courts of justice. Private and particular corporations, founded and endowed by individuals for charitable purposes, are subject to the private government of those who are the efficient patrons and founders. If there be no visitor appointed by the founder, the law appoints the founder himself, and his heirs, to be the visitors. The power of visitation, strictly speaking, extends only to eleemosynary corporations.

83. *How may corporations be dissolved?*—305.

A corporation may be dissolved, it is said, by statute; by the natural death or loss of all the members, or of an integral part; by surrender of its franchises; and by forfeiture of its charter through negligence or abuse of its franchises.

LECTURE XXXIV.

OF THE HISTORY, PROGRESS, AND ABSOLUTE RIGHTS OF PROPERTY.

1. *What first gave title to property in lands and movables?*—318, 319.

Occupancy. It is the natural and original method of acquiring it, and upon the principles of universal law, that the title continues so long as occupancy continues. There is no person, even in his rudest state, who does not feel and acknowledge, in a greater or less degree, the justice of this title. The right of property, founded upon occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions. There have been modern theorists, who have considered separate and exclusive property as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition if it were possible to be instituted or reörganized upon the basis of such speculations. The sense of property is graciously bestowed upon mankind for the purpose of rousing them

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from sloth, and stimulating them to action. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.

2. *What is the American law regarding title to wrecks?*—322.

The statutes of New York, Massachusetts, and other American States, declare that nothing that shall be cast by the sea upon the land shall be adjudged a wreck, but the goods shall be safely kept for the space of a year for the true owner, to whom the same are to be delivered upon his paying a reasonable salvage; and if the goods be not reclaimed within that time, they shall be sold, and the proceeds accounted for to the State.

3. *Does the English law of market overt apply with us?*—325, 326.

It has been frequently held in this country, that the English law of market overt had not been adopted; and, consequently, as a general rule, the title of the true owner can not be lost without his own free act and consent.

4. *What is the general doctrine regarding improvements on land recovered by action of ejectment?*—334, 335, *n.* (*b.*)

By the English law and the common law of this country, the owner recovers his land by ejectment, without being subjected to the condition of paying for the improvements which may have been made upon the land. The improvements are considered as annexed to the freehold, and passed with the recovery. But the statute law in Massachusetts, New Hampshire, Vermont, and other States, has altered and modified the common law in this respect.

5. *Are there not cases in which the rights of property are made subservient to the public welfare?*—338, 339, *n.* (*b.*)

Yes; there are many such. It is a maxim of law, that a private mischief is to be endured rather than a public inconvenience. The right of eminent domain gives to the Legisla-

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ture the control of private property for public uses, and for public uses only. But the Constitution of the United States, and those of most of the States of the Union, have imposed a great and valuable check upon this exercise of legislative power, by declaring that private property shall not be taken for public use without just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain.

LECTURE XXXV.

OF THE NATURE AND VARIOUS KINDS OF PERSONAL PROPERTY.

1. *Of what does personal property usually consist?*—340.

It usually consists of things temporary and movable, but it includes all subjects of property not of a freehold nature, nor descendible to the heirs at law.

2. *What is a chattel?*—342.

Chattel is a very comprehensive term in our law, and includes every species of property, which is not real estate, or freehold.

3. *What is the most leading division of personal property?*—342.

Into chattels real and personal.

4. *What are chattels real?*—342.

Chattels real are interests annexed to, or concerning the realty, as a lease for years of land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person.

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5. *What is the general rule as to fixtures?*—343–345.

Those things which the tenant has affixed to the freehold, for the purpose of trade or manufactures, may be removed, when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels. The tenant may also remove articles put up at his own expense for ornament or domestic convenience, unless they be permanent additions to the estate, and so united to the house as materially to impair it if removed, and when the removal would amount to a waste. The right of removal will depend upon the mode of annexation of the article, and the effect which the removal would have upon the premises.

Questions regarding fixtures principally arise between three classes of persons: 1. Between heir and executor; and there the rule obtains with most rigor in favor of the inheritance. 2. Between the executor and the remainderman or reversioner; and here the right to fixtures is considered more favorably for the executors. 3. Between landlord and tenant; and here the claim to have articles considered as personal property is received with great latitude and indulgence. 4. There is an exception, of a broader extent, in respect to fixtures erected for the purposes of trade, and the origin of it may be traced back to the dawnings of modern art and science.

6. *How is property in chattels personal divided?*—347.

It is either absolute or qualified.

7. *What does absolute, and what qualified, property in a thing denote?*—347.

Absolute property denotes a full and complete dominion over it. Qualified property means a temporary or special interest, liable to be totally divested on the happening of some particular event.

8. *In what may a qualified property subsist?*—347–350.

It may subsist by reason of the nature of the thing or chattel possessed, or from the nature of the title by which it is held. The elements of air, light, and water, are the subjects of quali-

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fied property by occupancy. Animals *ferœ naturæ*, so long as they are reclaimed by the art and power of man, are also the subjects of qualified property; but when they are abandoned or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases.

A qualified property in goods subsists by reason of the title, when they are bailed, pledged, or distrained. In those cases the right of property and the possession are separated; and the owner has only a property of a temporary or qualified nature, which is to continue until the trust be performed or the goods redeemed; and he is entitled to protect this property, while it continues, by action in like manner as if he were absolute owner.

9. *May personal property be held in joint tenancy, or in common?* —350.

Yes; and in the former case, the same principle of survivorship applies which exists in the case of a joint tenancy in lands. This right of survivorship does not, however, apply to stock used in any joint undertaking, either in trade or agriculture; when one of such joint tenants dies, his interest or share in the concern goes to his personal representatives.

10. *What are* choses in action?—351.

They are personal rights not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages due for breach of covenant, for the detention of chattels, or for torts, are included under this general head, or title to things in action.

11. *May chattels be limited over by way of remainder after a life interest in them is created?*—352, 353, *n.* (*d.*)

Yes; but not after a gift of the absolute property. The limitation may be either by will or deed. By the New York Revised Statutes, the absolute ownership of personal property can not be suspended for a longer period than two lives in being at the date of the instrument creating it, or, if by will, in being at the death of the testator. The accumulation of the profits of personal property may be made as aforesaid, to commence from the date of the instrument or death of the person executing the

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same, for the benefit of one or more minors then in being, and to terminate at the expiration of their minority; and if directed to commence at a period subsequent to the date of the instrument, or death of the person executing it, the period must be during the minority of the persons to be benefited, and terminate at the expiration of their minority. All directions for accumulation contrary hereto are void; and those for a longer term than such minority, are void as to the excess of time.

LECTURE XXXVI.

OF TITLE TO PERSONAL PROPERTY BY ORIGINAL ACQUISITION.

1. *How may title to personal property accrue?*—355.

In three different ways: 1. By original acquisition. 2. By transfer by act of law. 3. By transfer by act of the parties. The right of original acquisition may be comprehended under the heads of occupancy, accession, and intellectual labor.

2. *What is the modern rule as to the original acquisition of goods by occupancy?*—356.

The title by occupancy is becoming almost extinct under civilized governments, and it is permitted to exist only in those few special cases in which it may be consistent with public welfare; such as in case of goods casually lost by the owner and unreclaimed, or designedly abandoned by him.

3. *What is the rule as to the acquisition of property by accession?*—360.

That property in goods and chattels may be acquired by accession; and, under that head, is also included the acquisition of property proceeding from the admixture or confusion of goods.

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4. *How is the right of accession defined in the French civil code?* —360, 361.

It is defined to be the right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally or artificially. The fruits of the earth, produced naturally or by human industry, the increase of animals, and the new species of articles made by one person out of the materials of another, are all embraced in this definition; as if a person hires, for a limited period, a flock of sheep or cattle of the owner, the increase of the flock, during the term, belongs to the usufructuary, who is regarded as the temporary owner. The Roman law made a distinction as to the offspring of slaves, and so does the civil code of Louisiana. By means of Bracton the rules of the civil law regulating title by accession were introduced into the common law of England, and, they now prevail in the United States.

5. *What is the rule in the case of the confusion of goods?*—364.

With respect to the case where goods of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was willfully made, without mutual consent, then the civil law gave the whole to him who made the confusion, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. But this rule is carried no further than the necessity requires; and if the goods can be equally distinguished and separated, no change of property takes place. It is for the party guilty of the fraud to distinguish his property satisfactorily.

6. *What description of property is acquired by intellectual labor?* —365, 366.

Literary property, such as maps, charts, writings, and books; and mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and

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manual labor. As long as these are kept within the possession of the author, he has the same right to the exclusive enjoyment of them as of any other species of personal property; but when they are circulated abroad, and published with the author's consent, they become common property, and subject to the free use of the community. The jurisdiction of this subject is vested by the Constitution in the federal government.

7. *What is a patent?*—366.

It is defined to be a grant, by the State, of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend an invention.

8. *What provisions have Congress made in relation to patent rights for inventions?*—366, 367.

That any person, being a citizen of the United States, and any alien, who, at the time of his application, shall be a resident of the United States, and who hath invented any new and useful art, machine or manufacture, or composition of matter, or any new and useful improvement on the same, not known or used before the application, may apply to the Secretary of State for a patent for the exclusive right of making, constructing, using and vending, for fourteen years, his invention or discovery. The applicant must make oath, or affirmation, that he believes he is the true inventor or discoverer of the art, machine, or improvement; and must give a written description of his invention, and of the manner of using it, or of the process of compounding the same, in full, clear, and intelligible terms; he must particularly specify the part, improvement or combination, which he claims as his own invention; and accompany it with drawings, and references, and specimens, and models, according to the nature of the case; and cause the same to be attested and filed in the Secretary's office. The legal representatives and devisees of a person entitled to a patent, and who dies before it is obtained, may procure it. The patent may be renewed for a further term of seven years, and no person is to be debarred from receiving a patent for any invention, by reason of the same having been patented in a foreign country, if it have not been introduced into public and common use in this country prior to the application.

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9. *Is a patent right assignable?*—372.

Yes; and the patented article may be seized and sold on execution, but the patent right is not liable to sale on execution.

10. *What about trade marks?*—372, *note.*

Every manufacturer (including aliens), and every merchant for whom goods are manufactured, has the right to distinguish the goods he manufactures or sells by a peculiar mark or device, designating the origin or ownership of his articles, which no other person may assume. And this right may be protected by injunction and by action at law for damages.

11. *What is provided in relation to the copyrights of authors?*—373, 374.

That the authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of the United States, or residents therein, are entitled to the exclusive right of printing, reprinting, publishing and vending them, for the term of twenty-eight years from the time of recording the title thereof; and if the author, inventor or designer of any them, where the work was originally composed and made by more than one person, be living, and a citizen of the United States, or resident therein, at the end of the term, or, being dead, shall have left a widow, or child or children, either or all of them living, she or they are entitled to the same exclusive right for the further term of fourteen years, on complying with the terms prescribed by the act of Congress. Those terms are, that the author or proprietor, before publication, deposit a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the district wherein he resides, and which copy is to be recorded; and that he cause to be inserted on the title page, or the next following, of each and every edition of the book, and cause to be impressed on the face of the map, chart, musical composition, print, cut, or engraving, or upon the title or frontispiece of a volume of the same, the following words: "Entered according to the act of Congress, in the year ——, by A B, in the clerk's office of the District Court of ——" (as the case may

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be). He is then, within three months after publishing the book or other work as aforesaid, to cause to be delivered a copy of the same to the clerk of the said District Court, who is once in every year to transmit a certified list of all such records of copyright, and the several books or other works deposited as aforesaid, to the Secretary of State, to be preserved in his office. The violation of the copyright, thus duly secured, is guarded against by adequate penalties and forfeitures.

On the renewal of the copyright, the title of the work must be recorded, and the copy of the work delivered to the clerk of the district, and the entry of the record noticed as aforesaid at the beginning of the work; and all these regulations must be complied with, within six months before the expiration of the first term. And in addition to these regulations, the author or proprietor must, within two months from the date of the renewal, cause a copy of the record thereof to be published, in one or more of the public newspapers in the United States, for the space of four weeks.

12. *Can a copyright exist in a translation?*—381, 382.

Yes; and this, whether the translation be produced by personal application and expense, or by gift. A copyright may also exist in a part of a work, without having an exclusive right to the whole; and also in a real and fair abridgment of a book.

LECTURE XXXVII.

OF TITLE TO PERSONAL PROPERTY BY TRANSFER BY ACT OF LAW.

1. *In what cases may goods and chattels change owners by act of law?*—385.

In cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy.

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2. *In what case does the right of government to property by forfeiture take place in this country?*—385, 386.

In New York it is confined to the case of treason, and, that case, continues only during the life of the person convicted, and the rights of third persons, existing at the time of the commission of the treason, are saved. The right, so far as it exists in this country, depends upon local statute law; and the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony. Forfeiture of estate and corruption of blood, under the laws of the United States, and including cases of treason, are abolished.

3. *In what case may title to property be acquired by judgment?*—387.

In case of recovery by law, in an action of trespass or trover, of the value of a specific chattel, of which the possession has been acquired by tort, the title to the goods is altered by the recovery, and is transferred to the defendant; and the damages recovered are the price of the chattel so transferred by operation of law. There are conflicting decisions whether the recovery of a judgment, without satisfaction thereof, will thus transfer title.

4. *What is the rule as to the acquisition of title by bankruptcy or insolvency?*—390.

That the bankrupt's estate, as soon as an act of bankruptcy is committed, becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it.

5. *What has the Constitution of the United States prescribed in relation to bankruptcies?*—390, 391.

It has given to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. States may enact bankrupt and insolvent laws, provided they do not impair the obligation of contracts, nor affect the rights of the citizens of other States. At present, there is not any bankrupt system under the federal government, and the several States are left free to institute their own bankrupt systems, subject to the above limitations.

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6. *Is there any bankrupt law in New York?*—393, 394.

No: but there is a permanent insolvent law enabling every debtor, with the assent of two thirds in value of his creditors, and on the due disclosure and surrender of his property to be discharged from all his debts contracted within the State subsequently to the passing of the insolvent act, and due at the time of the assignment of his property, or contracted before that time, though payable afterwards.

7. *How about the other States?*—395, *n.* (*a.*)

The statutes for the relief of insolvent debtors in Connecticut, Ohio, New Jersey, Pennsylvania, Illinois, North Carolina, Tennessee, Georgia, and Missouri, go only to discharge and exempt the person of the debtor from imprisonment; and this is understood to be the limitation of insolvent laws in the greater number of the States.

8. *What is the American rule respecting conflicting claims arising under our attachment laws, and under a foreign bankrupt assignment?*—404–406.

It may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicil, with regard to the rule of preferences in the case of insolvents' estates.

9. *What force do we allow to the laws of other governments on this subject?*—406.

The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other States, it is upon a principle of comity, and only when neither the State, nor its citizens, would suffer any inconvenience from the application of the foreign law. A prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control.

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10. *In what case is title to property acquired by intestacy?*—408.

When a person dies, leaving personal property undisposed of by will; and in that case, the personal estate, after the debts are paid, is distributed among the widow and next of kin.

11. *With whom does the power of granting letters of administration lie?*—410, 411.

Now, usually with the surrogate of the county; and he has generally discretionary power to elect among the next of kin any one in equal degree, in exclusion of the rest, and to make such person sole administrator. So, under the English law, he may grant administration to the widow or next of kin, or to both jointly, at his discretion.

12. *In case of a married woman dying intestate, who is entitled to administer to her estate?*—411.

The husband, in preference to any other person; and he is liable, as administrator, for the debts of his wife, only to the extent of the assets received by him. If he does not administer, he is presumed to have assets, and is liable for the debts.

13. *May letters of administration be revoked?*—413.

Yes, if they have been unduly granted; and administration may be granted upon condition, or for a limited time, or for a special purpose.

14. *What is the established doctrine regarding all* bona fide *sales by executors and administrators?*—413.

That all sales made in good faith, and all lawful acts by administrators, before notice of a will, or by executors or administrators who may be removed or superseded, or become incapable, shall not be impeached on any will appearing, or by any subsequent revocation or superseding of such executors or administrators.

15. *How is nearness of kin computed under the English law?*—413.

According to the civil law, which makes the intestate himself the *terminus a quo*, or point from whence the degrees are numbered.

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16. *What are among the principal powers and duties of an administrator?*—414–416.

He should first give a bond with sureties, before a competent court, for the due execution of his trust. According to the common law, he should then make an inventory and appraisal of the goods and chattels of the intestate. On completion of the inventory and appraisal, he should collect outstanding debts, collect the property into money, and pay debts due from the intestate. In paying debts he should, under the common law, pay, first, funeral charges and probate expenses; next, debts due to the State; then debts of record, such as judgments, recognizances, and final decrees; next, debts due for rents, and debts by specialty, as bonds and sealed notes; and lastly, debts by simple contract. When debts are in equal degree, he may pay which he pleases first, and may prefer himself to other creditors in equal degree. But these common law rules have now been more or less altered, by statute law, in most of the States of the Union.

17. *What is the substance of the English statute of distributions?*—420–422.

That after the debts, funeral charges and just expenses are paid, a just and equal distribution of what remaineth clear, of the goods and personal estate of the intestate, shall be made amongst the wife and children or children's children, if any there be; or otherwise to the next of kin to the intestate, in equal degree, or legally representing their stock; that is to say, one third part of the surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of the intestate, and their representatives, if any of the children be dead, other than such child or children who have any estate by settlement, or shall be advanced by the intestate in his lifetime, by portion equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And if the portion of any child who hath had such settlement or portion, be not equal to the share due to the other children by the distribution, the child so advanced is to be made equal with the rest. If there be no children, or their representatives, one moiety of the personal estate

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of the intestate goes to the widow, and the residue is to be distributed equally among the next of kin, who are in equal degree, and those who represent them; but no representation is admitted among collaterals, after brothers' and sisters' children; if there be no wife, the estate is to be distributed equally among the children; and if no child, then to the next of kin in equal degree and their lawful representatives, as already mentioned.

18. *How are the next of kin determined?*—422–428.

By the rule of the civil law; and under that rule the father stands in the first degree, and the grandfather and the grandson in the second; and in the collateral line, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person. According to that rule, the intestate and his brother are related in the second degree, and the intestate and his uncle in the third. The half blood are admitted equally with the whole blood, for they are equally as near of kin; and the father of an intestate, without wife or issue, succeeds in exclusion of the brothers and sisters, and the mother would have also succeeded as against collaterals, but for a special clause which gives her only a ratable share. The distribution of personal property of intestates, in these United States, has undergone considerable modification. In many of them, the English statute of distributions, as to personal property, is pretty closely followed. In a majority of the States, the descent of real and personal property is to the same persons and in the same proportions, and the regulation is the same in substance, as the English statute of distributions, with the exception of the widow, as to the real estate, who takes one third for life only, as dower.

19. *What is the rule where the place of the domicil of the intestate, and the place of the situation of the property is different?*—429.

That the disposition, succession to, and the distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicil, at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. On the other hand,

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it is equally settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer and descent, is to be regulated by the *lex loci rei sitæ*.

LECTURE XXXVIII.

OF TITLE TO PERSONAL PROPERTY BY GIFT.

1. *What two kind of gifts are there?*—438.

1. Gifts, simply so called, or gifts *inter vivos*. 2. Gifts *causâ mortis* are those made in apprehension of death. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or *chose in action*; and it is the same whether it be a gift *inter vivos*, or *causâ mortis*. The subject of the gift must be certain, and there must be the mutual consent or concurrent will of both parties.

2. *What kind of delivery is requisite to perfect a gift?*—439.

Delivery, in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property.

3. *How do gifts affect creditors?*—440.

They do not affect the rights of creditors; as gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder and defraud creditors, are void, as against the person to whom such fraud would be prejudicial.

4. *What is the nature of gifts* causâ mortis?—444.

They are conditional, like legacies; and it is essential to

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them that the donor make them in his last illness, or in contemplation and expectation of death; if the donor recovers, they are void, if he die, they are good notwithstanding a previous will. The apprehension of death may arise from infirmity or old age, or from external and anticipated danger.

5. *What is the rule as to the revocation of gifts?*—444.

That gifts *inter vivos* are irrevocable, but that gifts *causâ mortis* are conditional and revocable.

LECTURE XXXIX.

OF CONTRACTS.

1. *What is an executory contract?*—449.

It is an agreement of two or more persons, upon a sufficient consideration, to do or not to do a particular thing.

2. *Into what classes are contracts divided?*—450.

Into contracts under seal and not under seal. If under seal, the contract is denominated a specialty, and if not under seal, an agreement by parol; and the latter includes equally verbal and written contracts not under seal.

3. *What is the distinction between a contract* executed *and a contract* executory?—450.

It is this; if one person sells and delivers goods to another for a price paid, the agreement is *executed*, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is *executory*, and rests in action merely. There are also *express* and *implied* contracts The former exist when the parties contract in express words, or by writing; and the latter are those contracts which the law raises.

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4. *What qualifications of the parties are essential to render a contract valid?*—450.

That they have sufficient understanding, and age, and freedom of will, and of the exercise of it, for the given case.

5. *What is the rule as regards contracts made by lunatics?*—450–452.

The contracts of lunatics are generally void, from the period at which the inquisition finds the lunacy to have commenced. But the inquisition is not conclusive evidence of the fact; and the party affected by the allegation of lunacy may gainsay it by proof, without first traversing the inquisition. The general rule is, that sanity is to be presumed until the contrary be proved; and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies upon the person who alleges it. On the other hand, if a mental derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown.

6. *What as to contracts made by an intoxicated person?*—451.

A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void. And it has been decided that an obligation, executed by a man when deprived of the exercise of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party.

7. *What is the rule where a general imbecility of mind exists?*—452.

That imbecility of mind is not sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law can not undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. Weakness of understanding may, however, be a material circumstance in establishing an in-

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ference of unfair practice or imposition; and it would naturally awaken the attention of a court of justice to every unfavorable appearance in the case. Nor is a person born deaf and dumb deemed absolutely *non compos mentis*, though by some of the ancient authorities he was deemed incompetent to contract.

8. *How as to contracts procured by violence, or misrepresentation?* —453.

If a contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by the plea of duress; it is requisite to the validity of every agreement that it be the result of a free and *bona fide* exercise of the will. Nor will a contract be valid if obtained by misrepresentation or concealment, or if it be founded in mistake as to the subject-matter of the contract.

9. *How are contracts made abroad to be construed in the courts of justice in this country?*—454–458.

The general rule is, that a contract, valid by the law of the place where it was made, is valid everywhere *jure gentium*, and by tacit consent. The *lex loci contractus* controls the nature, construction and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established. There is no doubt of the truth of the general proposition that the laws of a country have no binding force beyond its territorial limits; and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate*. There are, however, certain general rules, in respect to the admission of the *lex loci contractus*, to which we may confidently appeal, as being of commanding influence in the consideration of the subject. Thus, it may be laid down, as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation, and obligatory force, in every other country, which they have in the country where they were made; and also, that parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed.

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10. *What is the rule laid down by Huber relative to contracts made in one country and put in suit in the courts of another; and is his rule the true one?*—458.

The rule stated by him in his tract De Conflictu Legum, is, that the interpretation of the contract is to be governed by the law of the country where the contract was made, but the mode and time of suing must be governed by the law of the country where the action is brought. This is the true rule, and the one which courts follow.

11. *Are there any exceptions to this rule?*—458, 459.

Yes; it is a necessary exception to the rule, that no people are bound to enforce or hold valid, in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law. And it is a consequence of the admission of the *lex loci*, that contracts void by the law of the land where they are made, are void in every other country. Another exception is, where a contract is made in one country to be executed in another, and the parties had in view the laws of such other country in reference to the execution of the contract, in such case the contract, in respect to its construction and force, is to be governed by the law of the country in which it is to be executed.

12. *According to which law are remedies on contracts regulated?*—462.

According to the law of the place where the action is instituted, and the *lex loci* has no application. *Actio sequitur forum rei.* The *lex loci* acts upon the right, the *lex fori* on the remedy. This is the rule in all civilized countries, and it has become part of the *jus gentium.*

13. *How many places of jurisdiction are there in respect to remedies?*—463.

Three, properly speaking: 1. The place of domicil of the defendant, commonly called the *forum domicilii;* 2. The place where the thing in controversy is situate, commonly called the *forum rei sitæ;* 3. The place where the contract is made, or the

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act done, commonly called the *forum rei gestæ*, or *forum contractus.*

14. *Is it necessary to a contract that there be a consideration?*—463.

Yes; it is essential to the validity of a contract that it be founded on a sufficient consideration.

15. *What is a* nudum pactum ?—463, 464.

It is a contract without a consideration, and not binding in law, though it may be in point of conscience; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety. Whether the agreement be verbal or in writing, it is still a nude pact, and will not support an action if a consideration be wanting. The rule that a consideration is necessary to the validity of a contract, applies to all contracts not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent endorsee.

16. *What is a valuable consideration?*—465, 466.

It is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of right, will be sufficient to sustain the promise. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time; and in that case the one promise is a good consideration for the other. But if two concurrent acts are stipulated, as delivery by one party and payment by the other, no action can be maintained by either without showing a performance, or what is equivalent to a performance, of his part of the agreement. If the consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or request of the party promising; and that request must have been expressly, or be necessarily implied from the moral obligation under which the party was placed; and the consideration must have been beneficial to one, or onerous to the other party. The consideration must not

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only be valuable, but it must be lawful, and not repugnant to law, or sound policy, or good morals.

17. *What is a sale?*—468.

It is a contract for the transfer of property from one person to another, for a valuable consideration, and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.

18. *What about the thing sold?*—468.

It must have an actual or potential existence, and be specific or identified, and capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement. If the subject-matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future or actual delivery.

19. *Is the purchaser of an article entitled to be repaid his money, if the title or essential qualities of part of the subject fail without any fraud on the part of the vendor?*—471–476.

The cases on this point are conflicting; but it would seem to be sound doctrine, that a substantial error between the parties concerning the subject-matter of the contract, either as to the nature of the article, or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity. The good sense and equity of the law on the subject is, that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement of the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether.

20. *What about the price of the thing sold?*—477.

It must be real and not merely nominal, and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties.

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21. *Is the mutual consent of the contracting parties requisite?*—477.

It is requisite to the creation of the contract. A contract becomes binding when a proposition is made on one side and accepted on the other; and, on the other hand, if there be an error or mistake of a fact, or in circumstances going to the essence of it, it is not binding.

22. *What is the rule, in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title?*—478.

The rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as the agent for another, and for a fair price, he is understood to warrant the title.

23. *Is the seller bound to answer for the quality or goodness of the thing sold?*—478.

He is not, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law.

24. *What is the general rule on this subject?*—479.

The general rule is, that if there was no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects equally unknown to both parties.

25. *What is the duty of mutual disclosure in making contracts?*—482.

As a general rule, each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.

26. *Is a mere false assertion of value, where no warranty is intended, ground of belief to a purchaser?*—485–489.

It is not; because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ:

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Mere expression of judgment or opinion does not amount to a warranty. Every person reposes, at his peril, on the opinion of others, and when he has an equal opportunity to form and exercise his own judgment, *simplex commendatio non obligat.*

But an action will lie against a person, not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage, by trusting the purchaser on the credit of such misrepresentations.

27. *When does the contract of sale become absolute?*—492, 493.

When the terms of the sale are agreed on, and the bargain is struck, and every thing that the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or of payment. The payment or tender of the price is, in such cases, a condition precedent implied in the contract of sale, and the buyer can not take the goods, or sue for them, without payment or tender of payment. But, if the goods are sold on credit, and nothing said as to delivery, the right of possession and right of property vest immediately in the vendee.

28. *What if the purchaser becomes insolvent before the goods are delivered?*—493.

The seller may retain them, even if they were sold upon credit; or if he dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in *in transitu.*

29. *What is necessary, in the first instance, to make the contract of sale valid according to statute law?*—493.

That there must be a delivery or tender of it, or payment, or tender of payment, or *earnest* given, or a *memorandum* in writing signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of the goods as he pleases.

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30. *What is the rule as to what amounts to a delivery of the goods, so as to vest the entire property in the vendee without payment?* —494.

If every thing to be done on the part of the vendor be completed, a delivery of part of a cargo or lot of goods has, under certain circumstances, been considered a delivery of the whole, so as to vest the property. To constitute a part acceptance, so as to take the case out of the statute, there must have been such a dealing on the part of the purchaser, as to deprive him of the right to object to the quantity of the goods, or to deprive the seller of his lien.

31. *Can the vendee take the goods without payment, even if an earnest has been given?*—495.

He can not.

32. *What is the rule where no time is agreed on for payment?* —496.

It is understood to be a cash sale.

33. *When are the goods at the risk of the purchaser?*—498, 499.

The common law fixes the risk where the title resides; and when the bargain is made and rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attach to the purchaser.

34. *What amounts to a delivery?*—499.

Delivery of goods to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be sent by a carrier or by water, is equivalent to delivery to the purchaser, and the property, with the correspondent risk, vests in him, subject to the vendor's right of stoppage *in transitu*.

35. *In what cases is a symbolical delivery sufficient to pass the property?*—500–502.

The delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the warehouse-man or wharfinger's books to the name of the buyer, is a delivery

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sufficient to transfer the property. So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be constructive delivery of the goods. There may be a symbolical delivery when the thing does not admit of an actual delivery. The delivery must always be according to the subject-matter of the delivery, and the property must be placed under the control and power of the vendee.

36. *At what place is the delivery to be made?*—505–509.

If no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. But this rule is subject to many modifications dependent on the nature of the thing to be delivered.

37. *What has the statute of frauds provided in relation to certain contracts therein mentioned?*—510, 511.

That no action should be brought to[1] charge any executor or administrator, upon any special promise, to answer from damages out of his own estate; or to[2] charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to[3] charge any person upon any agreement made upon consideration of marriage, or[4] upon any agreement that was not to be performed in one year, unless there was some memorandum, or note in writing of the agreement, signed by the party to be charged or his agent. The statute, in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandise, in cases where there was no delivery and acceptance of part, or payment in part, or something earnest given. The signing of the agreement by one party is sufficient, provided he is the party sought to be charged. It is sufficient, likewise, if the note or memorandum be made by a broker employed to effect the purchase; and the instrument is liberally construed, without a scrupulous regard to forms.

38. *If there be a judgment against the vendor and the purchaser have notice of it, will that fact, of itself, affect the validity of the sale of personal property?*—512, 513.

No; but if the purchaser, knowing of the judgment, pur-

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chases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends upon the motive. The purchase must be *bona fide*, as well as upon a valuable consideration.

39. *What is the legal effect of an agreement between the parties, at the time of sale, that possession was not to accompany and follow the bill of sale of the goods?*—515–532.

There is no doubt of its being evidence of fraud; but whether the fraud is an inference of law, to be drawn by the court from the fact, or whether the fact is only evidence of fraud, to be judged of by the jury and capable of explanation, is a question on which the decisions are various and conflicting.

40. *Are voluntary assignments of their property by insolvent traders and others, valid?*—532.

A conveyance in trust to pay debts is valid, and founded on a valuable consideration. A debtor, pending a suit, may assign to trustees all his effects for the benefit of all his creditors, and deliver possession, and it will be valid. And a debtor in failing circumstances may, by assignment of all his estate in trust, and made in good faith, prefer one creditor to another, when no bankrupt or other law prohibits such preference, and no legal lien binds the property assigned.

41. *What are the principal rights and obligations of auctioneers?*—536.

An auctioneer has not only the possession of the goods which he is employed to sell, but he has an interest coupled with that possession. He has a special property in the goods, and a lien upon them for the charges of the sale, and his commission, and the auction duty. He may sue the buyer for the purchase money, and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk. If the auctioneer has notice that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of the

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sale. So, if the auctioneer does not disclose the name of his principal, at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages for its non-performance.

42. *How far are auction sales within the statute of frauds?*—539, 540.

The auctioneer is regarded as the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in the *memorandum* book of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute, so as to bind the purchaser.

43. *What is meant by the right of stoppage* in transitu?—540, 541.

It is the right which the vendor, when he sells goods to another on credit, has of resuming the possession of the goods, while they are in the hands of a carrier or middle man, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. The right exists only as between the vendor and vendee. If the price be paid or tendered, the vendor can not stop or detain goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. It assumes its existence and continuance; and, as a consequence of that principle, the vendee, or his assignees, may recover the goods on payment of the price; and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained.

44. *What persons are entitled to exercise this right?*—542.

The right exists in every case in which the consignor is sub-

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stantially the vendor; and it does not extend to a mere surety for the price, nor to any person who does not stand in the character of vendor or consignor, and rest his claim on a proprietor's right.

45. *What will defeat the right?*—543–546.

Actual delivery to the vendee, or circumstances which are equivalent to actual delivery.

There are cases in which constructive delivery will, and others in which it will not, destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. It will continue until the place of delivery be, in fact, the end of the journey of the goods, and they have arrived to the possession, or under the direction of the vendee himself. The delivery to the master of a general ship, or of one chartered by the consignee, is a delivery to the vendee or consignee, but still subject to this right of stoppage. And yet, if the consignee had hired the ship for a term of years, and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute. The cases generally upon constructive delivery may be reconciled by the distinction, that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for *safe custody*, or for *disposal on the part of the vendee*, and the middle man is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. So, a complete delivery of part of an entire parcel, or cargo, terminates the *transitus*, and the vendor can not stop the remainder.

46. *Will a re-sale of the goods by the vendee destroy the vendor's right of stoppage* in transitu?—547, 548.

Not of itself and without other circumstances. But if the vendor has given to the vendee documents sufficient to transfer the property, and the vendee, upon the strength of them, sells

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the goods to a *bona fide* purchaser without notice, the vendor would be divested of his right.

47. What are the principal legal rules for the interpretation of contracts?—554–557.

The mutual intention of the parties to the instrument is the great, and sometimes the difficult, object of inquiry, when the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law, when it becomes necessary, will control even the literal terms of the contract, if they manifestly contravene the purpose. Plain and unambiguous words need no interpretation. Words are to be taken in their natural and most obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense. If the intention be doubtful, it is to be sought after by reference to the context, and to the nature of the contract. It must be a reasonable construction, and according to the subject-matter and motive. The whole instrument is to be reviewed and compared in all its parts, so that every part may be made consistent and effectual. If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will enable us frequently to determine the precise import of the particular terms, and the certain intention declared by the use of them. Parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a written contract. Parol evidence is received, when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal. Contracts are to receive the sense in which the person making the promise believed the other party to have accepted it, if he, in fact, did so understand and accept it.

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LECTURE XL.

OF BAILMENT.

1. *What is a bailment?*—558.

A delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.

2. *How many species of bailment are there, according to Sir William Jones?*—558.

Five; viz.: 1. *Depositum*, or a naked deposit without reward. 2. *Mandatum*, or commission, which is gratuitous, and by which the mandatary undertakes to do some act about the thing bailed. 3. *Commodatum*, or loan for use without pay, and when the thing is to be restored in specie. 4. *A pledge*, as when a thing is bailed to a creditor as a security for debt. 5. *Locatio*, or hiring for reward.

3. *To how many kinds has Judge Story reduced bailments?*—559, *n.* (*b.*)

To three kinds: 1. Those in which the trust is for the benefit of the bailor, and which embrace deposits and mandates. 2. Those in which the trust is for the benefit of the bailee, as the *Commodatum*, or gratuitous loan for use. 3. Those in which the trust is for the benefit of both parties, as pledges or pawns, and hiring and letting to hire.

4. *What is* Depositum, *and what care is required in such a case from the bailee?*—560.

This is a bailment of goods to be kept for the bailor, and returned upon demand, without a recompense; and as the bailee or depositary derives no benefit from the bailment, he is to keep the goods with reasonable care; and he is responsible, if there be no special undertaking to the contrary, only for gross neglect, or for a violation of good faith. As a general rule, he is not answerable for mere neglect, if the goods be injured or destroyed while

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in his custody, if he takes no better care of his own goods, of the like value and under the like circumstances, and they be also spoiled or destroyed.

5. *In what cases is a mere naked depositary liable for ordinary neglect?*—565.

1. When he makes a special acceptance to keep the goods safely. 2. When he spontaneously and officiously proposes to keep the goods of another. A third case is, when the depositary is to receive a compensation for the deposit. The depositary is then held to ordinary care, and answerable for ordinary neglect; and the same conclusion follows when the deposit is made for the special accommodation of the depositary.

6. *What is* Mandatum?—568, 569.

Mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed. In the case of a deposit, says Mr. Justice Story, the principal object of the parties is the custody of the thing, and the service and labor accompanying the deposit are merely accessorial. In the case of a mandate, the labor and service are the principal objects of the parties, and the thing is merely accessorial.

7. *What amount of care is required from such a bailee?*—569–573.

If the mandatary undertakes to carry the article from one place to another, he is responsible only for gross neglect, or a breach of good faith. But if he undertakes to perform, gratuitously, some work relating to it, then, in that case, Sir William Jones maintains that the mandatary is bound to use a degree of diligence and attention suitable to the undertaking, and adequate to the performance of it. But Mr. Justice Story controverts the accuracy of this proposition, and the distinctions on this point, as well as on the questions of non-feasance and misfeasance, in bailments of this description, are very nice and difficult of being stated with precision.

8. *What is* Commodatum, *and what amount of diligence is required from the borrower?*—573, 575.

This is a bailment or loan of an article for a certain time,

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to be used by the borrower without paying for the use; and the same identical article is to be returned, in as good plight as it was when it was first delivered, subject, however, to the deterioration arising from the ordinary and reasonable use of the loan, and which deterioration the lender is to bear. The borrower is bound to bestow, on the preservation of the thing borrowed, not merely ordinary, but the greatest care; and he is responsible, not merely for slight, but for the slightest neglect.

9. *What of pledging?*—577, 578, *n.* (1.)

A pawn or pledge is the *pignori acceptum* of the civil law; and, according to that law, the possession of the pledge passed to the creditor (though it is not necessary that the possession of the thing should be actual, and it will be sufficient if the article be properly within the control of the pledgee); but the possession of the thing hypothecated did not. The pawnee is bound to take ordinary care, and is answerable only for ordinary neglect; for the bailment is beneficial both to debtor and creditor.

10. *What was the common law rule about redeeming the pledge?*—581.

At common law, if the pledge was not redeemed by the stipulated time, it did not then become the absolute property of the pawnee, but he was obliged to have recourse to process of law to sell the pledge; and until that was done, the pawnor was entitled to redeem.

11. *What is the present rule?*—582.

The law now is, that after the debt is due, the pawnee may proceed personally against the pawnor without selling the pawn, or he has the election of two remedies against the pledge itself—he may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure, or he may sell without judicial process, upon giving reasonable notice to the debtor to redeem.

12. *What of* Locatum, *or hiring for a reward?*—585.

It is a contract by which the use of a thing, or labor or services about it are stipulated to be given for a reasonable compensation, express or implied. It includes the thing let, the price

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or recompense, and a valid contract between the letter and hirer.

13. *How many kinds are there of this bailment?*—586.

Three: *locatio rei*, by which the hirer, for a compensation, gains a temporary use of the thing; *locatio operis faciendi*, or letting out of work and labor to be done, or care and attention to be bestowed by the bailee on goods bailed, for a recompense; *locatio operis mercium vehendarum*, as when goods are bailed to a public carrier or private person, for the purpose of being carried from one place to another, for a stipulated or implied reward.

14. *What diligence is required in the first two cases?*—586–591.

In the case of the *locatio rei*, the hirer gains a special property in the thing hired, and the letter to hire an absolute property in the price, and he retains a general property as owner of the chattel. The hirer is bound to ordinary care and diligence, and is answerable only for ordinary neglect; for this species of bailment is one of mutual benefit. He is bound to use the article with due care and moderation, and not apply it to any other use, or detain it for a longer period, than that for which it was hired. In the case of *locatio operis faciendi*, the workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. If he performs the work unskillfully, he becomes responsible in damages.

15. *What is meant by negligence, in those cases?*—587.

Negligence is a relative term; and the value of the article, and the means of security possessed by the bailee, are material circumstances in estimating the requisite care and diligence. That may be gross negligence, in the case of a parcel of articles of extraordinary value, which in the case of another parcel would not be so; for the temptation to theft, and the necessity for care are in proportion to the value.

16. *How does Justice Story subdivide the head of* Locatio?—591.

Into, 1. *Locatio operis faciendi*, or hire of labor and ser-

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vices. 2. *Locatio custodiæ*, or receiving goods on deposit for hire.

17. *What does he include under the head of* locatio custodiæ ?—591.

Agisters of cattle, warehouse-men and wharfingers, and also forwarding men, or merchants. They are all responsible for want of good faith, and of reasonable care and ordinary diligence, and not to any greater extent, unless the business and duty of carriers be attached to their other character.

18. *How are innkeepers considered in respect to liability ?—592.*

They are held to be responsible to as strict and severe an extent as common carriers ; and the principle was taken from the Roman law, and adopted into modern jurisprudence. In general, an innkeeper is responsible for the acts of his domestics, and for thefts, and he is bound to take all possible care of the goods and baggage of his guests, deposited in his house, or intrusted to the care of his family or servants.

19. *Who is an innkeeper within the meaning of the law ?—596.*

One who keeps a house, and holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received. But the keeper of a mere coffee house, or private boarding or lodging house, is not an innkeeper in the sense of the law. In New York, and throughout the Union, inns and taverns are under statute regulations, and their definition and character are contained in the statute.

20. *What are the principal rules governing the class of bailees called carriérs ?—597.*

That the carrier for hire, in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier. But if he be a common carrier, he is in the nature of an insurer, and is answerable for all accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the accepted cases of the act of

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God (meaning inevitable accident, without the intervention of man), and public enemies.

21. *Who are common carriers?*—598.

Persons who undertake generally, and for all persons indifferently, to convey goods, and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price.

22. *Into what two classes are they divided?*—598.

Into inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stages, wagons, and coaches, and railroad cars, who carry goods as well as passengers for hire, wagoners, teamsters, cartmen, porters, the masters and owners of ships, vessels, and all watercraft, including steam vessels, and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen, barge owners, canal boatmen, and ferrymen. As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite conveyance to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action.

23. *What are the duties and obligations of coach proprietors?*—600, 601.

They do not warrant the safety of passengers in the character of common carriers, and are not responsible for mere accidents to the persons of passengers, but only for the want of due care. Slight fault, unskillfulness or negligence, either as to the competence of the carriage, or the act of driving it, may render the owner responsible in damages for an injury to the passengers; they are to be transported as safely as human foresight and care will permit. The coach proprietor is not at liberty to turn away passengers if he has sufficient room and accommodation. He is bound to provide competent vehicles, suitably equipped, and with careful and skillful drivers. He is bound to give all reasonable facilities to the reception and comfort of the

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passengers, and to use all precautions, as far as human care and foresight will go, for their safety on the road. He is answerable for the smallest negligence in himself and his servants. The modern doctrine, and tendency of modern cases, seem to be, to place coach proprietors, in respect to baggage, upon the ordinary footing of common carriers. But their responsibility is now usually so limited, by means of a special notice, as probably to render this point quite unimportant.

24. *Have carriers by water been relieved of any of their common law liabilities?*—606, *n.* (2.)

Yes; in England statutes, passed in the reigns of George II. and George III., have exempted them from responsibility for losses by fire, and provided that the owners of vessels should not be liable for the loss of gold, silver, precious stones, etc., by robbery or embezzlement, unless the nature and value of the articles were specially declared, in writing, by the shipper to the master or owner of the vessel. Similar provisions are to be found in an act of Congress, passed March 3d, 1851.

25. *May carriers limit their responsibility by special notice of what they mean to assume?*—606, 607.

It seems that they can; and the goods in that case are understood to be delivered on the footing of a special contract, superseding the strict rule of the common law; and it is necessary, in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailor, and be clear, explicit and consistent. But it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party continues responsible for any loss or damage resulting from gross negligence, or misfeasance in him or his servants; and the question of responsibility has generally turned upon the fact of gross negligence.

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LECTURE XLI.

OF PRINCIPAL AND AGENT.

1 *On what is agency founded?*—612.

Upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business, and render an account of it.

2. *How may the authority of an agent be created?*—612.

By deed or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient.

3. *May agency be inferred without proof of any express appointment?*—613.

It may, from the relation of the parties, and the nature of the employment. It is sufficient, that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust.

4. *Can an agent convey real estate under an implied contract?*—614.

He can not; to convey lands he must have an appointment in writing; and where the conveyance is required to be by deed, the authority to the attorney to execute it must be commensurate, in point of solemnity, and be by deed also.

5. *When is the agency to be created?*—614.

It may be antecedently given, or be subsequently adopted; and in the latter case, there must be some act of recognition.

6. *Is an acquiescence in the assumed agency of another, equivalent to an express authority?*—614–616.

It is, when the acts of the agent are brought home to the

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knowledge of the principal. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit, thereafter, to the other in the capacity of his agent. When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed.

7. *What are the rights of an assumed agent against his principal?*—616, 617.

The Roman law would oblige a person to indemnify an assumed agent, acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement. But the English law has never gone to that extent; and therefore if A owes a debt to B, and C chooses to pay it without authority, the law will not raise a promise in A to indemnify C; for if it were so, it would be in the power of C to make A his debtor *nolens volens*.

8. *What is the English rule where there is an existing business relation between the parties?*—617.

That if payment be made under the pressure of a situation, in which one party was involved by the other's breach of faith, it will be binding on the person for whose use it was made. A surety, from his relation to the principal debtor, has an interest and a right to see that the debt be paid; and if he pays to relieve himself, it is his money paid to and for the use of the other.

9. *What is the rule as to the duty of an agent in the pursuance of his authority?*—617, 618.

That if an agent be intrusted with general powers, he must act with sound discretion, and he has all the implied powers within the scope of the employment. A power to settle an account, implies the right to allow payments already made. If he be an empowered agent for a particular transaction, he is not bound to go on and do all other things connected with, or arising out of the case. If his powers are special and limited, he must strictly follow them.

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10. *What if an agent do all he is authorized to do, and something more?*—618, 619.

It will be good so far as he had a right to go, and the excess only will be void. As if A authorizes B to buy an estate for him, at fifty dollars per acre, and he gives fifty-one dollars per acre, A is not bound to pay that price; but the better opinion is, that if B offers to pay the excess out of his own pocket, A is then bound to take the estate. This case is stated in the civil law, and the most equitable conclusion among the civilians is, that A is bound to take the estate at the price he prescribed. *Majori summæ minor inest.* But a distinction is to be made according to the nature of the subject. If a power be given to buy a house, with an adjoining wharf and store, and the agent buy the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. So, if he be instructed to purchase the fee of a certain farm, and he purchase an interest for life or years only, or he purchases only the undivided right of a tenant in common in the farm, in these cases the principal ought not to be bound to take such a limited interest, because his object was defeated. Whether the principal would or would not be bound by an act, executed in part only, depends in a measure upon the nature and object of the purchase.

11. *What if an agent has power to lease for twenty-one years, and he leases for twenty-six years?*—619, 620.

The lease, in equity, would be void only for the excess; because the line of distinction between the good execution of the power, and the excess, can be easily made. But, at law, even such a lease would not be good *pro tanto*, or for twenty-one years. If, however, the agent does a different business from that he was authorized to do, the principal is not bound, even though it might be more advantageous to him, because the agent departed from the subject-matter of the instruction.

12. *What is the distinction between the powers of a general agent, and those of one appointed for a special purpose?*—620, 621.

The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, or at a

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particular place, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary in order to prevent fraud, and encourage confidence in dealing. But an agent, constituted for a particular purpose, and under a limited power, can not bind his principal if he exceeds that power. The special authority must be strictly pursued. Whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power; though, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power.

13. *What if the servant of a horse dealer, who sells for his master, but with express instructions not to warrant as to soundness, does warrant, is the master bound by the warranty?*—621.

He is; because the servant, having a general power to sell, acted within the general scope of his authority; and the public can not be supposed to be acquainted with the private conversations between the master and servant. So, if a broker, whose business it is to buy and sell goods in his own name, be intrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale.

14. *If a person intrusts his watch to a watchmaker to be repaired, and he sells it, would the owner be bound by the sale?*—622.

He would not. The watchmaker is not exhibited to the world as owner, and credit is not given to him as such, merely because he has possession of the watch.

15. *What is the rule as to the right of brokers and factors to sell on credit, without a special authority for that purpose?*—622, 623.

That a factor or merchant who buys or sells upon commission, or as an agent for others for a certain allowance, may sell on credit, without any special authority for that purpose. It is the well-settled usage, that an agent may sell in the usual way, and, consequently, he may sell upon credit without incurring

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risk, provided it be the usage of the trade at the place, and he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser. But the factor can not sell on credit in a case in which it is not the usage, as in the sale of stock, for instance, unless he be expressly authorized, because this would be to sell in an unusual manner. Nor can he bind his principal to other modes of payment than a payment in money at the time of sale, or on the usual credit.

16. *What if the factor, at the expiration of the credit given on a sale, takes a note payable to himself at a future day?*—623.

He makes the debt his own. He can not bind his principal to allow a set-off on the part of a purchaser. If the factor, in a case duly authorized, sells on credit, and takes a negotiable note payable to himself, the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, would not render him personally responsible to his principal. Even if the factor should guaranty the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might waive the guaranty and claim possession of the note, or give notice to the purchaser not to pay it to the factor. In such a case, if the factor should fail, the note would not pass to his assignees to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due them, but to the principal, and did not pass under the assignment.

17. *What is the general doctrine on this subject?*—623, 624.

That where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article or its proceeds into the possession of the factor, or his legal representatives or assignees, unless they should have paid away the same, in their representative character, before notice of the claim of the principal. The same rule applies to the case of a banker who fails possessed of his customer's property. If it be

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distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the liens of the banker upon it.

18. *Is a factor, selling under a* del credere *commission, for an additional premium, liable to his principal in the first instance, or only as a surety?*—625, *n.* (*g.*)

It is now finally settled in England, and the doctrine has been adopted here by Mr. Justice Story, that the character of a broker, acting under a *del credere* commission, is that of a surety for the solvency of the party with whom his principal deals through his agency. He becomes a guarantor of the price of the things sold, and has an additional percentage for his responsibility. It has been decided in New York, that the contract of a factor to account for the sales under a *del credere* commission, is not within the statute of frauds, and need not be in writing.

19. *What is the rule as to the factor's right to pledge the goods of his principal?*—625.

That he can not pledge them as security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor, is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and can not be transferred by his tortious act. Though the factor should barter the goods of his principal, yet no property passes by the act, any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover.

20. *What exception is there to this rule?*—626.

The case of negotiable paper, for there possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as security for his own debt, and it will bind the principal, unless he can charge the party with notice of the fraud, or want of title in the agent.

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21. *What is the rule as to the factor's right to deliver the goods of his principal to a third person?*—626, 627.

That he may deliver them to a third person for his own security, with notice of his lien, and as his agent, to keep possession for him. Such a change of the lien does not affect the factor's right, for it is, in effect, a continuance of the factor's possession. So, if a factor, having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods, for purposes connected with the sale, as part payment in advance, or in anticipation of the sale, according to the ordinary uses in such cases. But if the goods be put into the hands of an auctioneer to sell, and, instead of advancing money upon them, in immediate reference to the sale, according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnor instead of seller, he has no lien on the goods.

22. *What alteration in the common law regarding factor and principal, has been made by statute in New York?*—628, *n.* (*b.*)

It was enacted, in 1830, that every factor intrusted with the possession of any bill of lading, custom house permit, or warehouse-keeper's receipt for the delivery of goods, or with the possession of goods for sale, or as security for advances, shall be deemed the owner, so far, as to render valid any contract by him for the sale or disposition thereof, in whole or in part, for money advanced, or any responsibility in writing assumed upon the faith thereof. The true owner will be entitled to the goods on repayment of the advances, or restoration of the security given on the deposit of the goods, and on satisfying any lien that the agent may have thereon.

23. *What is the rule as to the liability of an agent upon his contract as agent?*—630, 631.

The general rule is, that where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or when

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there is no responsible principal, or when as agent he becomes liable by an undertaking in his own name, or when he exceeds his power. If he makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable, even though he should take a note for the goods sold, payable to himself. And if an agent buys in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods came to his use, or the agent acted in the business intrusted to him and according to his power.

24. *What are the rules by which attorneys must execute powers?* —631, 632.

That an attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal. But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible, though he should, in the covenant, give himself the description or character of agent. And though the attorney, who acts without authority, but in the name of the principal, be not personally bound by the instrument he executes, if it contain no covenant or promise on his part, yet there is a remedy against him by special action on the case, for assuming to act when he had no power.

25. *What is the rule as to the owner's right to collect the proceeds of goods sold by his factor?*—632.

That he may command such proceeds, and is entitled to call upon the buyer for payment before the money is paid over to the factor; and a payment to the factor, after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. If, however, the factor should sell in his own name as owner, and not disclose his principal, a purchaser who dealt *bona fide* with the factor as owner, will be entitled to set off any claim he may

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have against the factor, in answer to a demand of the principal.

26. *What is the distinction made, in the books, in regard to personal responsibility between public and private agents?*—632, 633.

That if an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. But the agent, in behalf of the public, *may* bind himself by an express engagement. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given.

27. *Can an agent employ a sub-agent?*—633.

An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which can not be delegated.

28. *What is meant by an agent's right of lien?*—634.

The right of an agent to retain possession of property belonging to another, until some demand of his be satisfied. It is created either by common law, or by the usage of trade, or by the express agreement or particular usage of the parties.

29. *Into what classes are liens distinguished?*—634–637.

Into general and special. A general lien is the right to retain property of another, for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labor employed, or expenses bestowed, upon the identical property detained. General liens are looked upon with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors; and the usage of any trade, sufficient to establish a general lien, must have been so uniform and notorious as to warrant the inference, that the party against whom the right is claimed had

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knowledge of it. A general lien may be created by express agreement.

Particular liens are favored in law; and, as a general rule, every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This is equally so, whether there be or be not an agreement for the price, unless there be a future time of payment fixed.

30. *What is necessary to create a lien?*—638.

Possession of the goods, actual or constructive; and the right does not extend to debts which accrued before the character of factor commenced; nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight.

31. *What persons have a general lien on goods in their possession?*—640–642.

A factor has a general lien for the balance of his general account, arising in the course of dealings between him and his principal; and this lien extends to all the goods of the principal in his hands in the character of factor. The factor has a lien, also, on the price of the goods which he has sold as factor, though he has parted with the possession of the goods; and he may enforce payment from the buyer to himself, in opposition to his principal. This rule applies when he becomes surety for his principal, or sells under a *del credere* commission, or is in advance for the goods by actual payment. Attorneys and solicitors, as well as factors, have a general lien upon the papers of their clients in their possession, for the balance of their professional accounts. Dyers have likewise a general lien on the goods sent to them to dye, for the balance of a general account. A banker has also a general lien on all the paper securities which come to his hand. So has an insurance broker. A wharfinger has also a general lien.

32. *By what acts may an agency cease?*—643–646.

It may terminate by the death of the agent; by the limita-

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tion of the power to a particular period of time; by the execution of the business which the agent was constituted to perform; by a change in the condition of the principal; by his express revocation of the power; and by his death. The agent's trust is not transferable, either by the act of the party, or by operation of law. According to the civil law, if the agent had entered upon the execution of the trust in his lifetime, and left it partially executed, but imcomplete, at his death, his legal representatives would be bound to complete it. An authority given, for private, purposes to two persons can not be executed by the survivor, unless it be so expressly provided, or it be an authority coupled with interest.

A power of attorney, or every naked authority, is, in general, from the nature of it, revocable at the pleasure of the party who gave it, unless it constitutes part of a security for money, or is given for a valuable consideration, in which cases it is not revocable by the party himself, though it is necessarily revoked by his death. The agent's power is determined, likewise, by the bankruptcy of his principal. If the principal or his agent was a *feme sole* when the power was given, it is determined by her marriage. The authority of an agent may be revoked by the lunacy of the principal; but the better opinion would seem to be, that the lunacy must have been previously established by inquisition before it could control the operation of the power. The authority of an agent determines by the death of his principal, and a joint authority to two persons terminates by the death of one of them.

LECTURE XLII.

ON THE HISTORY OF MARITIME LAW.

1. *Is the marine law a municipal, or international law?*—1.

It is a part of the general law of nations, and not the law of a particular country. The marine law of the United States is the same as the marine law of Europe; and Lord Mansfield

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applied to its universal adoption the expressive language of Cicero, when speaking of the eternal laws of justice: *Nec erit alia lex Romæ, alia Athœnis; alia nunc, alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit.*

2. *What is known of the marine legislation of the ancients?*—2.

There is no certain evidence that either the Phœnicians, Carthagenians, or any of the States of Greece, formed any authoritative digest of naval law. Those powers were distinguished for navigation and commerce, and the Athenians in particular were very commercial, and they kept up a busy intercourse with the Greek colonies in Asia Minor, and on the borders of the Euxine and the Hellespont, in the islands of the Ægean Sea, and in Sicily and Italy. They were probably the greatest naval power in all antiquity. Themistocles had the sagacity to discern the wonderful influence and controlling ascendency of naval power. It is stated by Diodorus Siculus, that he persuaded the Athenians to build twenty ships annually. He established the Pirœus as a great commercial emporium and arsenal for Athens, and the cultivation of her naval superiority and glory was his favorite policy; for he held the proposition, which Pompey afterward adopted, that the people who were the masters of the sea would be masters of the world. The Athenians encouraged, by their laws, navigation and trade; and there was a particular jurisdiction, at Athens, for the cognizance of contracts and controversies between merchants and mariners.

3. *Who were the earliest people that actually created, digested and promulgated a system of marine laws?*—3.

The Rhodians. They obtained the sovereignty of the seas about nine hundred years before the Christian era, and were celebrated for their naval power and discipline. Their laws concerning navigation were received at Athens, and in all the islands of the Ægean Sea, and throughout the coasts of the Mediterranean, as a part of the law of nations.

4. *Where are the marine laws of the Rhodians to be found?*—4, 5.

One solitary title, in the Pandects, contains all the fragments

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that have floated down to modern times of their once celebrated maritime code, and we are to look to the collections of Justinian for all that remains to us of the commercial law of the ancients.

5. *By whom was the earliest code of modern sea laws established?* —9.

By the republic of Amalphi, in Italy, toward the end of the eleventh century.

6. *What code of marine law is the oldest now extant?*—10, 11.

The *Consolato del mare.* This is a compilation of the usages and laws of the Mediterranean powers, and is said to have been digested at Barcelona, in the Catalan tongue, during the middle ages, by order of the kings of Arragon. Its origin, however, is doubtful, and the precise time of its publication not known; but it is certain that it became the common law of all the commercial powers of Europe. The marine laws of Italy, Spain, France and England, were greatly affected by its influence; and it formed the basis of subsequent maritime ordinances.

7. *What collection is next in point of antiquity and celebrity?*—12, *n.* (*b.*)

The laws of Oleron. They were collected and compiled in the island of Oleron, on the coast of France, in or about the time of Richard I. They were borrowed from the Rhodian laws, and the *Consolato*, with alterations and additions, was adapted to the trade of western Europe. They have been admitted as authority on admiralty questions in the courts of justice in this country, and are to be found in the appendix to the first volume of Peters' Admiralty Decisions. There is likewise annexed to these reports a copy of the laws of Wisbuy, of the Hanse Towns, and of the Marine Ordinance of Louis XIV.

8. *By whom were the laws of Wisbuy compiled?*—13.

By the merchants of the city of Wisbuy, in the island of Gothland in the Baltic Sea, about the year 1288. They were in many points a repetition of the judgments of Oleron, and became the basis of the Hanseatic League.

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9. *About what time was the Hanseatic League formed?*—14, 15.

This renowned association was begun at least as early as the middle of the thirteenth century, and it originated with the cities of Lubec, Bremen and Hamburg. The free and privileged Hanse Towns became the asylum of commerce and the retreats of civilization, when the rest of Europe was subjected to the iron sway of the feudal system, and the northern seas were infested by "savage clans, and roving barbarians." Their object was mutual defense against piracy by sea and pillage by land. They were united by a league offensive and defensive, and with an inter-community of citizenship and privileges. The association of the cities of Lubec, Brunswick, Dantzic, and Cologne, commenced in the year 1254, according to Cleirac, and in 1164, according to Azuni; and it became so safe and beneficial a confederacy, that all the cities and large towns on the Baltic, and on the navigable rivers of Germany, acceded to the union. A digest of nautical usages and regulations was framed by the consuls and deputies of the Hanseatic League, under the title of *Jus Hanseaticum Maritimum*, and was published at Hamburg in 1667, with a commentary by Kuricke. It was founded on the laws of Oleron and Wisbuy, and, from the great influence and character of the confederacy, has always been deemed a compilation of authority.

10. *At what time was the French Ordinance upon commerce promulgated?*—15–17.

In 1673, and the Ordinance of the Marine in 1681. This ordinance, called The Marine Ordinance of Louis XIV., it having been framed in his reign, was, says Valin, executed in a masterly manner. It was so comprehensive in its plan, so excellent in the arrangement of its parts, so just in its decisions, so wise in its general and particular policy, so accurate and clear in its details, that it deserves to be considered as a model of a perfect code of maritime jurisprudence. Every commercial nation has rendered homage to the French Ordinance of the Marine; and they have regarded it as a digest of the maritime law of civilized Europe. Valin has written a commentary upon every part of it, which almost rivals the ordinance itself.

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11. *Where is the English maritime law to be found?*—18, 19.

The English nation never had any general and solemnly-enacted code of maritime law, resembling those which have been mentioned as belonging to the other European nations, and promulgated by legislative authority. This deficiency has been provided for, not only by several extensive private compilations, but has been more eminently, and more authoritatively, supplied by a series of judicial decisions, commencing about the middle of the last century. Those decisions have shown, to the admiration of the world, the masterly acquaintance of the English judiciary with the principles and spirit of commercial policy and general jurisprudence, and they have afforded undoubted proofs of the entire independence, impartiality, and purity of the administration of justice. The numerous cases in the books of reports, which have arisen upon maritime questions, resemble elementary treatises in the depth, extent, and variety of their researches. The English maritime law can now be studied, in the adjudged cases, with at least as much profit, and with vastly more pleasure, than in the dry and formal didactic treatises and ordinances professedly devoted to the science.

12. *Where do we find the marine law of the United States?*—19, 20.

As in England, in private treatises and judicial decisions. Our improvement has been rapid and our career illustrious, since the adoption of the present Constitution of the United States. There have been several respectable treatises on the subjects of commercial law. The decisions in the federal courts, in commercial cases, have done credit to the moral and intellectual character of the nation; and the admiralty courts, in particular, have displayed great research, and a familiar knowledge of the principles of the marine law of Europe. The decisions in Gallison's and Mason's reports, may be regarded as specimens of preëminent merit.

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LECTURE XLIII.

OF THE LAW OF PARTNERSHIP.

1. *What is a partnership?*—23.

It is a contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.

2. *What are the two leading principles of the contract?*—24.

A common interest in the stock of the company, and a personal responsibility for the partnership engagements.

3. *To what does the common interest apply?*—24.

To all the partnership property, whether vested in the first instance by their several contributions to the common stock, or afterwards acquired, in the course of the partnership business; and that property is first liable for the debts of the company; and after they are paid, and the partnership dissolved, then it is subject to a division among the members, or their representatives, according to agreement.

4. *What if one party advance funds, and another furnishes his personal services or skill, in carrying on a trade, and is to share the profits?*—24, 25.

It amounts to a partnership. But each party must engage to bring into the common stock something that is valuable; and a mutual contribution of that which has value is of the essence of the contract. And it will be a partnership, though the proportion of profit or loss, on the part of the person contributing his labor or skill, be unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent.

5. *Are joint possessors partners?*—25.

A joint possession renders persons tenants in common, but

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it does not, of itself, constitute them partners, and, therefore, surviving partners, and the representatives of a deceased partner, are not partners, notwithstanding they have community of interest in the joint stock. There must be a communion of profit to constitute a partnership, as between the parties, though it is not necessary that there be a community of interest in the property itself.

6. *Is a joint purchase, with a view to separate and distinct sales by each person on his own account, sufficient to constitute a partnership?*—25.

It is not.

7. *If several persons, who had never met and contracted together as partners, agree to purchase goods in the name of one of them only, and to take aliquot shares of the purchase, and employ a common agent for that purpose; do they by that act become partners, and answerable to the seller in that character?*—25, 26.

They do not, provided they are not jointly concerned in the re-sale of their shares, and have not permitted the agent to hold them out as jointly liable with himself. The same distinction was taken in the civil law: *qui nolunt inter se contendere, solent per nuntium rem emere in commune; quod a societate longe remotum.* It has been frequently recognized in this country, and may be considered as a settled rule.

8. *What if the purchase be on a separate, and not on a joint account?*—26.

If the interests of the purchasers be afterwards mingled, with a view to a joint sale, a partnership exists from the time that the shares are brought into a common mass. A participation in the loss or profit, or holding himself out to the world as a partner, so as to induce others to give credit on that assurance, renders a person responsible as a partner.

9. *What does a partnership necessarily imply?*—26.

A union of two or more persons.

10. *What if a single individual, for the purpose of a fictitious credit, were to assume a co-partnership name?*—26.

The only real partnership principle that could apply to his

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case, would be the preference to be given to creditors dealing with him under that description, in the distribution of his effects. But that would be inadmissible, and contrary to the grounds upon which partnerships are created and sustained: and so the law has been understood and declared in Scotland.

11. *What is the rule in relation to large unincorporated joint stock companies?*—26.

Trading upon joint stock is usually regulated by special agreement; but the established law of the land, in reference to such partnerships, is the same as in ordinary cases, and every member of the company (whatever private arrangement there may be to the contrary between the members, and which is only a mischievous delusion), is liable for the debts of the concern.

12. *What is the rule in relation to incorporated companies?*—27.

That incorporated companies, though constituted expressly for the purposes of trade, are not partnerships, or joint traders, within the purview of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company. To render them liable requires an express provision, to that effect, in the act of incorporation.

13. *In what manner may the contract of partnership be formed?*—27.

It need not be in writing; for though there be no express articles of co-partnership, the obligation of a partnership engagement may equally be implied in the acts of the parties; and if persons have a mutual interest in the profits and loss of any business, carried on by them, or if they hold themselves out to the world as joint traders, they will be held responsible as partners to third persons, whatever be the nature of their private agreement. Actual intention is requisite to constitute a partnership *inter se;* and if a person partake of the profits, he is liable for the losses.

14. *Can there be a partnership in other than commercial business?*—28, 29.

Yes; the essence of the association is that the parties be

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jointly concerned in profit and loss, or in profit only, in some honest and lawful business, not immoral in itself, nor prohibited by the law of the land. The proportion of profits may be regulated at will, and if there be no agreement on the subject, the general conclusion of law is, that the profits and losses are to be borne equally; and this, though the contribution between the parties consist entirely of money by one, and entirely of labor by the other.

15. *Is it necessary that every member of the company should, in every event, participate in the profits?*—29.

No; it would be a valid partnership, according to the civil law, if one of the members had a reasonable expectation of profit. So, one partner may retire under an agreement to abide his proportion of risk of loss, and take a sum in gross for his share of future uncertain profits; or he may take a gross sum as his share of the presumed profits, with an agreement that the remaining partners are to assume all the risks.

16. *What is the rule as to the extent of partnership connections?*—30.

That there may be a general partnership at large, or it may be limited to a particular branch of business, or to one subject. There may be a partnership in the goods in a particular adventure, or it may be confined to the profits thereof. If two persons should draw a bill of exchange, they are considered as partners in respect to that bill, though in every other respect they remain distinct.

17. *What is the rule governing dormant partners?*—31.

That they are equally liable when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt.

18. *Who are nominal partners?*—32–34.

Persons who have no actual interest in the trade, or its profits; but who become responsible as partners by voluntarily suffering their names to appear to the world as partners, by which means they lend to the partnership the sanction of their

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credit. There is a just and marked distinction between partnership as respects the public, and as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. Each individual is answerable *in solido* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. Even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute money or labor, or to receive any part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it would not receive, nor perhaps deserve. This principle of law inculcates good faith and ingenuous dealing, and it is now regarded by the English courts as a fundamental doctrine. It has been explicitly asserted with us, and is now incorporated in the jurisprudence of this country.

19. *What if executors, in the disinterested performance of a trust, continue the testator's share in a partnership, for the benefit of his infant children?*—33.

They may render themselves personally liable as dormant partners.

20. *May a person receive a part of the profits of a business, without becoming a legal or responsible partner?*—33, 34.

Yes, in certain cases. To allow a clerk or agent a portion of the profits as a compensation for labor, or a factor a percentage on sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in profit, in the character of profits, and there is no mutuality between the parties.

21. *Were limited partnerships allowed at common law?*—34, 35.

No; but such partnerships are now permitted by statute in most of the States. The New York statute allows a limited

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partnership for the transaction of any mercantile, mechanical, or manufacturing business, within the State, and enacts, among other things, that such partnerships shall consist of one or more persons jointly and severally responsible according to the existing laws, who are called general partners, and one or more who furnish certain funds to the common stock, and whose liability shall extend no further than the fund furnished, and who are called special partners. The names of the special partners are not to be used in the firm, which shall contain the names of the general partners only, without the addition of the word *company*, or any other general term; nor are they to transact any business on account of the partnership, or be employed for that purpose as agents; but they may advise as to the management of the concern.

Before such partnership can act, a registry thereof must be made in the county clerk's office, accompanied by a certificate containing the particulars of the partnership, including the amount of capital put in by the special partner. Publication must also be made for six weeks of the partnership terms.

22. *What is the legal interest of partners in their stock in trade?* —36, 37.

They are joint tenants, but without the *jus accrescendi*, or right of survivorship; and this, according to Lord Coke, was part of the law merchant. On the death of one partner, his representatives become tenants in common with the survivor, and, with respect to *choses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor, for the benefit of all the parties in interest. The interest of each partner, in the partnership property, is his share in the surplus, after the partnership accounts are settled, and all just claims satisfied.

23. *What is the legal interest of partners in real estate acquired with partnership funds?*—37–39, *notes.*

A joint tenancy in law, yet equity will hold it to be a tenancy in common, and as forming part of the partnership fund; and the better opinion would seem to be, that equity will consider the person, in whom the legal estate is vested, as trustee for

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the whole concern, and the property will be entitled to be distributed as personal estate. In New York, it has been held that in equity such real estate is chargeable with partnership debts, and with any balance due from one party to the other on winding up the affairs of the firm; and that the surplus, as between the personal representatives and heirs at law of a deceased partner, is to be considered as real estate.

24. *How are ship-owners considered?*—39, 40.

In *Nicol* v. *Mumford*,* it was held that ship-owners were tenants in common, and were not to be considered as partners, nor liable each *in solido*, nor entitled to the settlement of accounts on the principle of partnership. Yet ships, as well as other chattels, *may* be held in strict partnership, with all the control in each partner incident to common civil partnerships.

25. *In what acts may a partner bind his firm?*—40–43.

The act of each partner, in transactions relating to the partnership, and within the scope of the business of the firm, is considered the act of all, and binds all. One partner can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and endorse, and accept bills and notes, and assign *choses in action*. The act of one partner, though on his private account, and contrary to private arrangement among themselves, will bind all the parties, if made without knowledge in the other party of the arrangement, and in a matter which, according to the usual course of dealing, has reference to business transacted by the firm.

In all contracts concerning negotiable paper, the act of one partner binds all; and even though he signs his individual name, provided it appears, on the face of the paper, to be on partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, in his own name only, and without it appearing to be on partnership account, the partnership is not bound by the signature, even though it was made for a partnership purpose. If, however, the bill be drawn by one partner, in his own name, upon the firm, on partnership account,

* 4 Johns. Ch., 522.

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the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as upon an accepted bill.* And though the partnership be not bound, at law, in such a case, it is held that equity will enforce the payment of it, if the bill was actually drawn on partnership account. And negotiable paper of the firm, given by one partner on his private account, issued within the general scope of the authority of the firm, and passing into the hands of a *bona fide* holder, who has no notice, either actual or constructive, of the consideration of the instrument, will bind the firm.

26. *What is the rule with respect to the power of each partner over the partnership property ?*—44.

It is settled that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. A like power, in each partner, exists in respect to purchases on joint account ; and it is no matter with what fraudulent views the goods were purchased, or to what purposes they were applied by the purchasing partner, if the seller be clear of the imputation of collusion.

27. *In what cases may a partner pledge the partnership effects ?*—46.

A partner may pledge, as well as sell the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and it has relation to the trade in which the partners are engaged, or when the pawnee had no knowledge that the property was partnership property. But this principle does not extend to part owners engaged in a particular purchase ; for they are regarded as tenants in common, and no member can convey to the pawnee, a greater interest than he himself has in the concern. If one member acts fraudulently with strangers in a matter within the scope of the partnership authority, the firm is, nevertheless, bound by the contract.

* But see *Babcock* v. *Stone*, 3 McLean's R., 172.

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28. *How far may a partner bind his co-partners by guaranty?*—46, 47.

It was formerly understood that one partner might bind his co-partners by a guaranty, or letter of credit, in the name of the firm; and Lord Eldon considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, that one partner is not authorized to bind the partnership by a guaranty of the debt of a third person, without a special authority for that purpose, or one to be implied from the common course of the business, or the previous course of dealing between the parties, unless the guaranty be afterward adopted by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and be confined to advances made, or credit given, to the partnership as then constituted, and not extended to new advances or credits, after a change of any of the original partners by death or retirement, and then it will be obligatory upon the company; and this is the principle on which the distinction rests.

29. *In what cases may a partner bind his firm by deed?*—47–50.

A partner can not charge the firm by deed, with a debt, even in commercial dealings. But one partner may, by the special authority of his co-partners under seal, and if in their presence, by parol authority, execute a deed for them in a transaction in which they were all concerned. The more recent cases have very considerably relaxed the former strictness on this subject; and while they profess to retain the rule itself, they qualify it exceedingly, in order to make it suit the exigencies of commercial associations. An absent partner may be bound by a deed executed on behalf of the firm by his co-partner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.

One partner may, by deed, execute the ordinary release of a debt belonging to the co-partnership, and thereby bar the firm of a right it possessed jointly. A release by one partner to a partnership debtor, after the dissolution of the partnership, has been held to be a bar of any action at law against the debtor So, also, in bankruptcy, one partner may execute a deed, and do any other act requisite in proceedings in bankruptcy. The ac-

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knowledgment of a debt by a single partner, during the continuance of the partnership, will bind the firm. But one partner can not bind the other by submission to arbitration, and it is now settled in New York, in several of the other States, and by the Supreme Court of the United States, that the acknowledgment of one partner, after the dissolution of partnership, will not take a partnership debt out of the statute of limitations.

30. *How may a partnership be dissolved?*—52, 53.

If a partnership be formed for a single purpose or transaction, it ceases as soon as the business is completed. If it be for a definite period, it terminates of course when the period arrives. It may be dissolved by the voluntary act of the parties, or of one of them, and by the death, insanity, or bankruptcy of either, and by judicial decree, or by such change in the condition of one of the parties as disables him to perform his part of the duty. It may also be dissolved by operation of law, as by reason of war between the governments to which the partners respectively belong, rendering the business carried on by the association impracticable and unlawful.

31. *What is the rule as to dissolution by the voluntary act of the parties?*—53, 54.

The established principle is, that, if the partnership be for an indefinite period, any partner may withdraw at a moment's notice, or when he pleases, and dissolve the partnership. The civil law contains the same rule on the subject. The existence of engagements with third persons, does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected. But if the parties have formed a partnership by articles, for a definite period, in that case it is said, that it can not be dissolved without mutual consent before the period arrives. In New York, it has been held, that the voluntary assignment by one partner of all his interest in the concern dissolved the partnership, though it was stipulated in the articles, that the partnership was to continue until two of the partners should demand a dissolution, and the other partners wished to continue the partnership.

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32. *What effect has the death of a partner?*—56.

It is *ipso facto* a dissolution of the partnership, however numerous the association may be.

33. *What is the effect of insanity?*—58.

It does not *ipso facto* work a dissolution of the partnership. That depends upon circumstances, under the sound discretion of a Court of Equity.

34. *What effect has the bankruptcy of a partner?*—58, 59.

Bankruptcy or insolvency, either of the whole of the partnership, or of an individual member, dissolves the partnership. A *bona fide* voluntary assignment by a partner of all his interest in the partnership stock, has the same effect. The dissolution takes place, and the joint tenancy is severed, from the time that the partner, against whom the commission issues, is adjudged a bankrupt, and the dissolution relates back to the act of bankruptcy. If all the interest of a partner be seized and sold on execution, that fact will likewise terminate the partnership.

35. *May partnership be dissolved, by judicial decree, in any other case than that of lunacy?*—60.

Yes; it may be dissolved, at the instance of one partner, against the consent of the rest, when the business for which it was created is found to be impracticable, and the property invested liable to be wasted and lost, or when the association is found to be visionary, or founded on erroneous principles, or when the original agreement between the partners is tainted with fraud.

36. *What are the consequences of a dissolution of a partnership?*—62–64.

When a partnership is actually ended by death, notice, or other effectual mode, no person can make use of the joint property in the way of trade, or inconsistently with the purpose of settling the affairs of the partnership, and winding up the concern. The power of one partner to bind the firm ceases immediately upon its dissolution, provided the dissolution be occasioned by death, or bankruptcy, or by operation of law; though

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in cases of voluntary dissolution, notice is requisite for the benefit of third persons; and the partners from that time become distinct persons, and tenants in common of the joint stock. One partner can not indorse bills and notes previously given to the firm, nor accept a bill previously drawn upon it, so as to bind it. A dissolution is in some respects prospective only, and either of the former partners can receive payment of debts due to the firm, and give a release. On a dissolution by death, the surviving partner settles the affairs of the concern. The good will of a trade is not partnership stock. It has been decided to be the right of the survivor. But it was afterwards doubted, whether the good-will did survive, and could be separated from the lease of the establishment, and especially if the survivor continued the trade with the joint funds.

37. *What is the rule as to payment of debts?*—64.

The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the fund takes place.

38. *What is the rule as to notice of the dissolution?*—66–68.

To render the dissolution safe and effectual, there must be due notice given of it to the world; and a firm may be bound, after the dissolution of the partnership, by a contract made by one partner, in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. What shall be a sufficient implied notice has been a vexed question in the books. A notice, in one of the public and regular newspapers of the city or county where the partnership business was carried on, is the usual mode of giving information, and may, in ordinary cases, be quite sufficient. As to persons who have been previously dealing with the firm, it is requisite that actual notice be brought home to the creditor, or, at least, that notice be given under circumstances from which actual notice may be inferred. If the facts are all found or ascertained, the reasonableness of notice may be a question of law for the court, but generally it will be a mixed question of law and fact. When a single partner retires from the

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firm the same notice is requisite, and if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, he will still be holden. A dormant partner may withdraw without giving public notice.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

1. *Are promissory notes and bills of exchange governed by the same rules?*—72, 73.

Yes; the statute of 3d and 4th Anne made promissory notes, payable to a person, or to his order or bearer, negotiable like inland bills, according to the custom of merchants; and by the statutes of 9 and 10 William III., c. 17, and 3 and 4 Anne, inland bills are put upon the footing of foreign bills, except that no protest is requisite. These statutes have been generally adopted in this country, either formally or in effect, and promissory notes are everywhere negotiable. The effect of the statute is to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one apply to the other.

2. *What is a bill of exchange?*—74.

It is a written order or request, and a promissory note a written promise, by one person to another, for the payment of money, absolutely and at all events. If A, living in New York, wishes to receive one thousand dollars, which await his order in the hands of B, in London, he applies to C, going from New York to London, to pay him one thousand dollars, and take his draft on B, for that sum payable at sight.

3. *By what terms are the parties known in law?*—75.

A, who draws the bill, is called the *drawer*. B, to whom it

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is addressed, is called the *drawee*, and, on acceptance, becomes the *acceptor*. C, to whom the bill is made payable, is called the *payee*. As the bill is made payable to C, or his order, he may, by indorsement, direct the bill to be paid to D, and, in that case, C becomes the indorser, and D, to whom the bill is indorsed, is called the indorsee, or holder.

4. *What is the character of a check?*—75.

It is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay, but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange.

5. *What are the principal requisites of a bill of exchange?*—75–78.

It is not confined to any set form of words. A promise to *deliver*, or to be *accountable*, or to be responsible for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money. In England, negotiable paper must be for the payment of money in specie, and not in bank notes. In this country, it has been held that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. But the doctrine of these cases has been met and denied, and it seems the weight of argument is against them, and in favor of the English rule. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the bill. It is not necessary that the note should be made at home. Foreign, as well as inland notes, are negotiable. The instrument must be made payable to the payee, and to his order or assigns, or to bearer, in order to render it negotiable. It must have negotiable words on its face, showing it to have been the intention of the parties to give it a transferable quality. Without them it is a valid instrument as between the parties, and entitled to the three days of grace. If the name of the payee or indorser be left blank, any *bona fide* holder may insert his own name as payee. The words *value*

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received, though usually inserted, are unnecessary. Nor is it necessary that the maker should subscribe his name at the bottom of the note; and it is sufficient if the maker's name be on any part of it, as if it should run, I, *A B, promise to pay C D, or order, one hundred dollars.* A note payable to a fictitious person may be sued on, by an innocent indorsee, as a note payable to bearer; and such bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payee was fictitious was known to the acceptor.

6. *What are, principally, the rights of the holder of a bill or note?* —78–80.

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer, or indorsed in blank, and such a holder can recover upon the paper, though it came to him from a person who had stolen it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration, when not overdue, and under circumstances of due caution; and he need not account for his possession of it, unless suspicion be raised. There are but few cases in which a bill, or note is void in the hands of an innocent indorsee for a valuable consideration. They are, for instance, when the consideration in the instrument is money won at play, or it be given for a usurious debt, or where the contract is by statute declared absolutely void.

7. *May the consideration of a bill, note, or check, be inquired into between the original parties?*—80.

Yes; it may be inquired into between the maker and payee, and between the indorser and indorsee. The consideration of the indorsement, also, may be shown, as between the latter, for they are, in this view, treated as original parties.

8. *Within what time must a bill be presented for acceptance?*— 82, 83.

There is no precise time fixed by law, in which bills payable at sight, or by a given time, must be presented to the drawee for acceptance. The holder need not take the earliest opportunity. A bill, payable at a given time after date, need not be presented

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for acceptance before the day of payment; but if presented, and acceptance is refused, it is dishonored, and notice must then be given to the drawer. A bill payable sixty days after sight, means sixty days after acceptance; and such a bill, as well as a bill payable on demand, must be presented in a reasonable time, or the holder will have to bear the loss proceeding from his default.

9. *How must the acceptance be made?*—83, *n.* (*a*)–85.

It may be by parol, or in writing, and general or special. By the revised statutes of New York, the acceptance must be in writing, signed by the acceptor or his lawful agent. Though a bill comes into the hands of a person with a parol acceptance, and he takes it in ignorance of such an acceptance, he may avail himself of it afterward. If the acceptance be special, it binds the acceptor *sub modo*, and according to the acceptance. A parol promise to accept a bill already drawn, or thereafter to be drawn, is binding, if the bill be taken in consideration of the promise. In New York, an unconditional promise, in writing, to accept a bill, before it is drawn, is an acceptance, in favor of the person who receives the bill on the faith of it, for a valuable consideration. Every act giving credit to the bill amounts to an acceptance. The acceptance may be impliedly, as well as expressly given. It may be inferred from the act of the drawee, in keeping the bill a great length of time, contrary to the usual mode of dealing. Refusal by the drawee to return the bill within twenty-four hours to the holder, is deemed an acceptance under the New York statute.

10. *What is the effect of a conditional acceptance?*—84.

The holder is not bound to receive any acceptance varying from the terms of the bill, but if he does receive it, the acceptor is not liable for more than he has undertaken. If a bill be accepted payable at a particular place, the holder is bound to make demand at that place.

11. *What are the obligations of the acceptor of a bill?*—86.

The acceptance renders him the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or release. He is bound, though he accepted without

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consideration, and for the sole accommodation of the drawer. Accommodation paper is now governed by the same rules as other paper. These are the strict obligations of the acceptor in relation to the other parties to the bill, but they do not apply, in all their extent, as between the drawer and the party who indorses, or lends his name to the bill, as surety for the accommodation of the drawer.

12. *What is an acceptance* supra protest?—87.

It is where a third person, after protest for non-acceptance by the drawee, intervenes, and becomes a party to the bill, in a collateral way, by accepting and paying the bill for the honor of the drawer, or of a particular indorser.

13. *What are the obligations and rights of the acceptor* supra protest?—87, 88.

He subjects himself to the same obligations as if the bill had been directed to him; but the bill must be duly presented to the drawee at maturity, and if not paid, it must be duly protested for non-payment, and due notice given to the acceptor *supra protest*, to make his liability as such acceptor absolute. He has his remedy against the person for whose honor he accepted, and against all the parties who stand prior to that person, on giving due notice of the dishonor of the bill. If he takes up the bill for the honor of the indorser, he stands in the light of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties. There can be no other acceptor after a general acceptance by the drawee. A third person may become liable on his collateral undertaking, as guaranteeing the credit of the drawee, but he will not be liable as acceptor. It is said, however, that when the bill has been accepted *supra protest*, for the honor of one party to the bill, it may, by another individual, be accepted *supra protest*, for the honor of another. The holder is not bound to take an acceptance *supra protest*, but he would be bound to accept an offer to pay *supra protest*. The protest is necessary, and should precede the collateral acceptance or payment; and if the bill, on its face, directs a resort to a third person, in case of

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refusal by the drawee, such direction becomes a part of the contract.

14. *What is the rule as to the transfer of bills by indorsement?* —88.

A valid transfer may be made by the payee, or his agent, and the indorsement is an implied contract that the indorser has a good title, that the antecedent names are genuine, that the bill or note shall be duly honored or paid, and if not, that he will, on due protest and notice, take it up.

15. *What is the effect of a blank indorsement?*—89.

A note indorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself, or any other person, assignee of the bill. Even a bond, payable to bearer, has been held to pass by delivery, in the same manner as a bank-note payable to bearer, or a bill of exchange indorsed in blank. The holder may strike out the indorsement to him, though in full, and all prior indorsements in blank, except the first, and charge the payee or maker.

16. *How may the negotiability of a bill, originally negotiable, be stopped?*—89.

By a special indorsement by the payee, but no subsequent indorsee can restrain the negotiability of the bill. The first indorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged, or fraudulently circulated.

17. *What if a blank note or check be indorsed?*—89.

It will bind the indorser for any sum, or to any time of payment, which the person to whom he intrusts the paper chooses to insert in it. This only applies to the case in which the body of the instrument is left blank.

18. *What is the rule, where negotiable paper is taken after it is due?*—91.

The presumption is against the validity of the paper, and the purchaser takes it at his peril, and subject to every defense existing against it before it was negotiated.

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19. *When is a note, payable on demand, deemed out of time?* —91.

When the facts are ascertained, the reasonableness of the time given is matter of law, and every case will depend on its circumstances. Eighteen months, eight months, seven months, five months, even two and a half, when unexplained by circumstances, have been held an unreasonable delay; and if the demand be not made in a reasonable time, by the holder, the indorser is discharged.

20. *How must the demand for acceptance, and protest, of a bill be made?*—93, 94.

It is usually made by a notary, and, in case of non-acceptance, he protests it, and this notarial protest receives credit in all courts and places, by the law and usages of merchants, without any auxiliary evidence; and it is a requisite step, by the custom of merchants, in a case of a foreign bill, and must be made promptly upon refusal. It must be made at the time, in the manner, by the persons prescribed, and in the place where the bill was payable. Protest of inland bills was not required at common law. Bills drawn in one state, on persons living in another state, are to be treated as foreign bills.

21. *What is the rule as to notice of non-acceptance?*—94, 95.

After the protest for non-acceptance, immediate notice must be given to the drawer and indorser, in order to fix them, and the omission would not be cured by the bill being presented for payment, and subsequent notice of non-payment as well as non-acceptance. The drawer or indorser may be sued forthwith upon the protest for non-acceptance, without waiting until the bill be presented for payment and refused. This is the rule in most of the States, but by the Supreme Court of the United States, and in Pennsylvania, protest for non-payment has been held sufficient.

22. *How must demand of payment be made?*—95–98.

It must be made when the bill falls due, by the holder or his agent, upon the acceptor, at the place appointed for payment, or at his house or residence, or regular known place of his

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moneyed business, or upon him personally, if no particular place be appointed, and it can not be made by letter through the post office. The general principle is, that due diligence must be used to find out the party, and make demand; and the inquiry will always be, whether, under the circumstances of the case, due diligence has been used. If the party has absconded, that will as a general rule excuse the demand. If he has changed his residence to some other place, within the same state or jurisdiction, the holder must make endeavors to find it, and make the demand there; though, if he has removed out of the State, subsequently to accepting the bill, presentation at his former place of residence is sufficient. If the person, at whose house the note or bill is made payable, be the holder of the paper, it is sufficient for him, as holder, to examine the accounts, and ascertain that the party who is to pay has no funds deposited.

23. *What if a bill, drawn generally, be accepted specially?*—99, *n.* (*a.*)

It is a qualified acceptance which the holder is not bound to take; but if he does take it, the old rule was that demand must be made at the place appointed and not elsewhere. But the Supreme Court of the United States have recently held,* that when a bill or note was made payable at a specified time or place, it was not necessary to aver in the declaration, or prove at the trial, that a demand for payment was made at the time and place. If the maker or acceptor was ready at the time and place to pay, that was matter of defense. This may now be considered the law on the subject throughout the United States.

24. *What is the rule as to the three days of grace?*—100–103.

That they apply equally, according to the custom of merchants, to foreign and inland bills and to promissory notes, and as between the indorser and the indorsee of a negotiable note; and the acceptor has within a reasonable time of the end of business, or bank hours, of the third day of grace (being the third after the paper falls due), to pay. The three days of grace apply equally to bills payable at sight; but a bill or note paya-

* *Wallace* v. *McConnell*, 13 Peters, 136.

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ble on demand, or where no time of payment is expressed, is payable immediately on presentment, and is not entitled to the three days of grace.

25. *What steps are requisite to fix the drawer and indorser of a bill or check?*—104, 105.

The holder must not only show a demand, or due diligence to get the money of the drawee of the bill or check, or of the maker of the note, but he must give reasonable notice of their default to the drawer and indorsers, to entitle himself to a suit against them. An indorser, duly notified, is liable, though the drawer, or a prior indorser be not notified; and it is the business of the indorser, on receiving notice, to give like notice to the drawer and all persons to whom he means to resort. Notice to one of several partners, or to one of several joint drawers or indorsers, is notice to them all. The question of reasonable notice is usually compounded of law and fact, and proper for the decision of a jury under the advice and direction of the court.

26. *What is held to be reasonable notice?*—106, 107.

According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes the next day after the third day of grace. Reasonable diligence and attention is all that the law enacts; and it seems to be now settled, that each party, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice; and putting the notice by letter into the post office is sufficient, though the letter should miscarry. But it is not necessary to send by the public mail. The notice may be sent by a private conveyance, or special messenger, and it would be a good notice, though it should happen to arrive on the same day a little behind the mail. The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still notice may be left there. If the parties live in different towns, the letter must be forwarded to the post office nearest to the party.

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27. *What is necessary to be expressed in the notice?*—108–110.

It is sufficient that it state the fact of non-payment, and it is not necessary that it state expressly, when it may be justly implied, that the holder looks to the indorser. It is sufficient for the agent to give notice to his principal of the dishonor of a bill, and it then becomes necessary for the principal to give the requisite notice, with due diligence, to the parties to be fixed.

28. *In what cases is notice not required?*—109–111.

If the party be absent, or has absconded, or his place of residence be unknown, and due and diligent inquiry be made, or he have no residence, or giving notice be physically or morally impossible, the want of notice will be dispensed with; but it must be given as soon as the impediment is removed.

If the drawee refuse to accept, because he has no effects of the drawer in his hands, notice to the drawer is not necessary. This exception to the general rule is confined strictly to want of effects, and to cases in which the drawer had no right to expect that his bill would be honored. Notice is required if the want of it would produce detriment; and the exception applies only to the drawer. Neither the insolvency of the drawer, or drawee, or acceptor, or the fact that the drawee had absconded, does away with the necessity of demand of payment, and notice to the drawer and endorser. If a bank check be taken in the ordinary course of business, it is not an absolute payment, but only the means to procure the money, and the holder is bound to present it for payment with ordinary diligence, and the next day will be in season. But if the bank be totally prohibited, by process of law, from the exercise of its functions, before the check can, with due diligence, be presented, no demand need be made, or notice given; and the holder may waive the check altogether, and resort to his original demand. So, if the maker of the check has no funds at the bank, at the date of the check, it need not be presented for payment previous to a suit upon it.

29. *What if delay be given to the drawee of a bill, or maker of a note?*—111, 112.

It will discharge the other parties; but the agreement for delay must be one having a sufficient consideration, and bind-

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ing in law upon the parties; mere indulgence will work no prejudice. Simply forbearing to sue the acceptor, or taking collateral security from him, is no discharge; but giving him new credit and time, or accepting a composition in discharge of the acceptor, will produce that result. The holder must do nothing, to impair the right, which the drawer and indorser have, to resort by suit to the acceptor for indemnity, or which would amount to a breach of faith in him toward the acceptor.

30. *What is the above rule, as to delay, understood to require?*—112.

That the holder shall not so deal with the acceptor of the bill, or maker of the note, by giving time, or compounding, or giving credit, as to prejudice the right of the other parties to the bill, without their assent. The holder may give time to an immediate indorser, and proceed against the parties behind him. A prior party to a bill is not discharged by a release of a subsequent party. But the holder can not reverse this order.

31. *What acts of the indorser or drawer will amount to a waiver of notice?*—113.

A subsequent promise to pay, by the party entitled to notice, provided the promise was made clearly and unequivocally, and even under a mistake of the law, if it was with full knowledge of the fact of want of due diligence on the part of the holder. So, if the indorser has protected himself from loss by taking sufficient collateral security.

32. *What if an indorser comes again in possession of the bill?*—114.

He will be regarded *prima facie* as the owner, and may sue and recover, as against prior parties, though there be on it subsequent indorsements, and no receipt or indorsement back to him; and he may strike out the subsequent names.

33. *What will discharge the acceptor?*—114.

Nothing short of the statute of limitations, or payment, or a release, or an express declaration of the holder. He is bound, like the maker of a note, as a principal debtor. His acceptance is evidence that the value of the bill was in his hands, or had

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been received by him from the drawer. He is liable to the payee, to the drawer, and to every indorser. He is liable to an innocent holder, though the drawer's hand be forged; and, in the suit against him, it is not necessary to prove any hand but that of the first indorser.

34. *What is the usual course, in Europe, pursued by the holder of a protested bill, in order to procure indemnity?*—115.

The general law merchant authorizes the holder to re-draw, from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.

35. *What is the rule of allowance, upon protested paper, in this country?*—117, *n.* (*a.*)

The proper rule, in cases of debt payable in a foreign country, in England for instance, and sued in the United States, is to allow that sum, in the currency of the country, which approximates most nearly to the amount to which the party is entitled in the country where the debt was payable, and calculated by the established par of exchange. But the creditor is, also, entitled to have an amount, equal to what he must pay in order to *remit* it to the place where it was payable. He ought to have just as much allowed him, where he sues, as he would have had if the contract had been duly performed.

36. *What is the rate of damages on bills drawn and payable within the United States, or other parts of North America?*—117, 118.

The New York Revised Statutes provide, that, upon bills drawn or negotiated within the State, upon any person, at any place within the six States east of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages, upon the usual protest for non-acceptance or non-payment, shall be three per cent. upon the principal sum specified in the bill; and, upon any person within the States of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent.; and, upon any person in any other State or Territory of the United States, or at any

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other place on, or adjacent to this continent, and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the western Atlantic Ocean, or Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previously to and at the time of giving notice of non-acceptance or non-payment.

The laws and usages of the other States vary essentially on this subject. In some the result is nearly similar, while, in other States, the damages allowed vary from four and a half to fifteen per cent.

37. *What is a mercantile guaranty?*—121.

It is a promise to answer for the payment of some debt or duty, in case of the failure of another person who is in the first instance liable.

38. *What is the principal legal rule governing a mercantile guaranty?*—121, 122.

The English statute of frauds, which has been adopted throughout this country, requires, that "upon any special promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum thereof, must be in writing and signed by the party, to be charged therewith, or some other person thereunto by him lawfully authorized." An agreement to become a guarantor is within the statute; and if it be a guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration, must, according to the English decisions, be in writing. The English construction of the statute, in this respect, has been adopted in New York and South Carolina, and rejected in several other States. The decisions have all turned on the force of the word *agreement;* and where by statute the word *promise* has been introduced, as in Virginia, Tennessee, and Mississippi, the construction has not been so strict, and the consideration of the promise need not be in writing.

39. *What are some of the principal rights and duties of the respective parties to a mercantile guaranty?*—123, 124.

The doctrine in the case of negotiable paper, as to demand

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and notice, has a feeble and qualified application to the guarantor. Thus it has been held, that the guarantor of a note could be discharged by the laches of the holder, as by neglect to make demand of payment of the maker, and to give notice of non-payment to the guarantor, provided the maker was solvent when the note fell due, and became insolvent afterwards. And, in the case of the absolute guaranty of the payment of a note, no demand or notice is requisite to fix the guarantor. The claim against a surety is *strictissimi juris;* and the surety, who pays the debt of his principal, will, in a clear case, in equity, be entitled to all the liens held by the creditor, who is bound to preserve them unimpaired when he intends to look to the surety for payment.

LECTURE XLV.

OF THE TITLE TO MERCHANT VESSELS.

1. *How may the law of shipping be arranged?*—129.

It may be conveniently arranged under the three following heads, viz.: 1. Of the title to vessels; 2. Of the persons employed in the navigation of merchant ships; and 3. Of the contract of affreightment.

2. *What are the requisites to a title to a ship?*—130–132.

A bill of sale is the true and proper muniment of title, and one which the maritime courts of all nations will look for, and, in their ordinary practice, require. In Scotland, a written conveyance of property in ships has, by custom, become essential; and, in England, it is made absolutely necessary by statute, as to British subjects. Possession of a ship and acts of ownership will, in this, as in other cases of property, be presumptive evidence of title, without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof; and a sale and delivery of a ship, without a bill of sale, writing, or instrument, will be good at law, as between the parties.

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Upon the sale of a ship in port, delivery of possession is necessary to make the title perfect; and by an act of Congress, passed July 29th, 1850, no bill of sale of any vessel is valid against any person but the grantor, unless it be recorded in the collector's office where the vessel is registered and enrolled. If the buyer suffers the seller to remain in possession, and act as owner, and the seller should become bankrupt, the property would be liable to his creditors, and, in some cases, also to judgment creditors on execution. The same rule exists in the case of the mortgage of the ship; but where a sale is by a part owner, it is similar to the sale of a ship at sea, and actual delivery can not take place. Delivery of the muniments of title will be sufficient, unless the part owner be himself in actual possession. If the ship be sold while abroad, or at sea, a delivery of the grand bill of sale, and other documents, transfers the property, as in the case of the delivery of the key of a warehouse.

3. *What is understood by the grand bill of sale?*—133.

The instrument whereby the ship was originally transferred from the builder to the owner, or first purchaser. But the American cases speak simply of a bill of sale, and usually refer to the instrument or transfer from the last proprietor while the vessel is at sea, and which is sufficient to pass the property, if accompanied by the act of taking possession as soon as conveniently may be after the vessel arrives in port.

4. *What will constitute a person owner, for the purpose of charging him for necessaries and repairs?*—133, 134.

The ownership, in relation to this subject, is not determined by the register, and the true question, in matters relating to repairs, is, upon whose credit was the work done. Nor is a regular bill of sale of property, essential to exempt the former owner from responsibility for supplies furnished. But where the contract of sale is made, and the possession delivered, the circumstance that the naked legal title remains in the vendor, for his security, does not render him liable, as owner, on contracts, or for the conduct of the master.

5. *How is the liability of mortgagees considered?*—134, 135.

It has been a disputed question, whether the mortgagee of

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a ship, before he takes possession, be liable to the burdens and entitled to the benefits belonging to the owner. The weight of American authority has been in favor of the position, that a mortgagee of a ship, out of possession, is not liable for repairs or necessaries furnished on the order of the master, and not upon the particular credit of the mortgagee, who was not in receipt of the freight; though the rule is otherwise, when the mortgagee is in possession and the vessel employed in his service. To whom was the credit given, seems to be the ground on which the question ought to stand.

6. *In what cases is the charterer liable for supplies furnished the ship?*—137, 138.

The question in these cases is, whether the owner, by reason of the charter party, has divested himself of the ownership *pro hac vice*, and whether there has been any direct contract between the parties varying the responsibility. The question of responsibility depends upon the inquiry, whether the lender or hirer, under a charter party, be the owner of the ship for the voyage. If the general owner retains the command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. But where the freighter hires the possession, command, and navigation of the ship, he becomes the owner, and is responsible for the conduct of the master and mariners; and the general owner has no lien for freight.

7. *What is necessary, under the registry acts, in order to entitle a vessel to the privileges of a United States ship?*—141–143.

No vessel is deemed a vessel of the United States, nor entitled to the privileges of one, unless registered, and wholly owned and commanded by a citizen of the United States. The American owner in whole, or in part, ceases to retain his privileges as such owner, if he usually resides in a foreign country, during the continuance of such residence, unless he be a consul, or agent for and a partner in some American house, carrying on trade within the United States. The register is to be made by the collector of the port to which the vessel belongs, or in which it

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shall be, and founded on the oath of the owners, stating the time and place where she was built, or that she was captured in war, by a citizen, as prize and lawfully condemned; and stating the owners and master, and that they are citizens, and that no subject of a foreign power is, directly or indirectly, by way of trust, or otherwise, interested therein. Previous to the registry, a certificate of survey is to be produced, and security given, that the certificate of such registry shall be solely used for the ship, and shall not be sold, lent, or otherwise disposed of. If the vessel, or any interest therein, be sold to a foreigner, and the vessel be within the United States, the certificate of the registry shall, within seven days after the sale, be delivered up to the collector of the district to be canceled; and if the sale be made when the vessel is abroad, or at sea, the certificate is to be delivered up within eight days after the master's arrival within the United States; and if the transfer be made to a foreigner, in a foreign port, for the purpose of evading the revenue laws of the foreign country, it works a forfeiture of the vessel, unless the transfer be made known within eight days after the return of the vessel to a port in the United States, by a delivery of the certificate of registry to the collector of the port. So, if a registered ship be sold, in whole or in part, while abroad, to a citizen of the United States, the vessel, on her first arrival in the United States thereafter, shall be entitled to all the privileges of a ship of the United States, provided a new certificate of registry be obtained within three days after the master makes his final report upon her first arrival. If the vessel be built in the United States, the ship-carpenter's certificate is requisite to obtain the register; and when the ship is duly registered, the collector of the port shall grant an abstract or certificate of such registry.

8. *What form is requisite in the transfer of American ships?*—143.

There must be some instrument in writing, in the nature of a bill of sale, which shall recite at length the certificate of registry, and without it the vessel is incapable of being registered anew. Upon every change of master, the owner must report such change to the collector.

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9. *What are the rules prescribed in regard to the coasting trade?* —144.

In order to obtain a license to carry on the coasting trade or fisheries, the owner, or the ship's husband and master, must give security to the United States, that the vessel be not employed in any trade whereby the revenue of the United States may be defrauded; and the master must make oath that he is a citizen, and that the license shall not be used for any other vessel, or any other employment; and if the vessel be less than twenty tons burden, that she is wholly the property of a citizen of the United States. The collector thereupon grants a license to carry on the coasting trade or fishery. Vessels engaged in such trade or business, without being enrolled or licensed, or licensed only, as the case may be, shall pay alien duties, if in ballast, or laden with goods the growth or manufacture of the United States, and shall be forfeited if laden with any articles of foreign growth or manufacture, or distilled spirits.

10. *In what relation do part owners of a ship stand toward each other?*—151.

As tenants in common. Each has his distinct, though undivided interest; and when one of them is appointed to manage the concerns of the ship, he is termed the ship's husband.

11. *How is the employment of the ship regulated?*—151–153.

If there be no certain agreement among the owners, the Court of Admiralty authorizes a majority in value of the part owners to employ the ship upon any probable adventure, and, at the same time, takes care to secure the interest of the dissenting minority. In such case, the ship sails wholly at the charge and risk, and for the benefit of, the majority. If the part owners are equally divided in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her.

12. *Is there a distinction between part owners and partners in a ship?*—154.

Yes; a clear and well-settled one. A part owner is but a tenant in common, and he has only a disposing power over his

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own interest in the ship. But there may be a partnership as well as a co-tenancy in a vessel; and in that case one part owner, in the character of partner, may sell the whole vessel.

13. *When is a person to be considered as part owner, and when as partner?*—155, *n.* (*b.*)

It will depend on circumstances; a part ownership is the general relationship between ship-owners, and a partnership the exception which requires to be specially shown. Part owners are analogous to partners, and liable, under that implied authority, for necessary repairs and stores ordered by one of them. This is said to be the principle and limit of the liability of part owners, but there may be cases when the general rule is otherwise.

14. *What is the rule as to the joint responsibility of part owners?*—156.

That they are responsible *in solido*, as partners, for repairs and necessary expenses relating to the ship, and incurred on the authority of the master or ship's husband. But where a ship has been duly abandoned to separate insurers, they are not responsible to each other as partners, but one is answerable for the previous expenses of the ship, ratably to the extent of his interest as an insurer, and no further.

15. *Who is the ship's husband?*—157.

He may be either one of the part owners, or a stranger, and he is sometimes merely an agent for conducting the necessary measures on the return of the ship to port. His contracts, in the proper line of a ship's husband's duty, will bind the joint owners.

16. *Are part owners of the cargo tenants in common or partners?*—157.

They are tenants in common of the cargo, as well as of the ship.

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LECTURE XLVI.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

1. *What are the qualifications which the master should possess?* —159, 160.

He must be a person of experience and practical skill, as well as deeply initiated in the theory of navigation. He must watch for the preservation of the health and comfort of the crew, as well as for the preservation of the ship. It is necessary that he should maintain perfect order, and preserve the most exact discipline, under the guidance of justice, moderation, and good sense. Charged frequently with the sale of the cargo, and the reinvestment of the proceeds, he must be fitted to superadd the character of merchant to that of commander; and he ought to have a general knowledge of the marine law, and of the rights of belligerents, and the duties of neutrals, so as not to expose to unnecessary hazard the persons and property under his protection.

2. *What authority may the master exercise?*—161–163.

As he is the confidential agent of the owners, he has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of the ship. And the person furnishing supplies, or repairs, can sue the owner, or the master personally, unless the credit was expressly confined to the owner. The master may, by charter party, bind the ship and freight. This he may do in a foreign port, in the usual course of the ship's employment; and this he may also do at home, if the owner's consent can be presumed. The ship and freight are, by the marine law, bound to the performance of the contract. The master can bind the owners, not only in respect to the usual employment of the ship, but in respect to the means of employing her. His power relates to the carriage of goods, and the supplies requisite for the ship, and he can bind the owner personally as to repairs and necessaries for the ship. But the supplies must appear to be reasonable, or the money advanced for the purchase

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of them to have been wanting, and there must be nothing in the case to repel the ordinary presumption, that the master acted under the authority of the owners. The master, when abroad, and in the absence of the owner, may hypothecate the ship, freight, and cargo, to raise money requisite to complete the voyage; and if the owner be personally bound, it must be to the extent of the requisite advances. The master may, also, if necessary, in the course of the voyage, sell a part of the cargo, to enable him to carry on the residue.

3. *What is the law as to the master's right of lien on the ship?* —165–167, *n.* (*e.*)

It is settled, in England, that the master has no lien on the ship, freight, and cargo, for any debt of his own, as for wages, or stores furnished, or repairs done at his expense, either at home or on the voyage. The captain is distinguished from all other persons belonging to the ship, and he is considered as contracting personally with the owners, while the mate and mariners contract with the master on the credit of the ship. He can hypothecate and create a lien in favor of others, but he himself must stand on the personal credit of his owners.

In this country, the general current and language of the American cases seem now to have settled the question, that the master has such a lien for his advances and responsibilities, as against the owner, though there should be no question as to the owner's solvency and responsibility. The American cases have taken the most reasonable side of the question. It was adjudged in the District Court of Maine, that the master had a lien on the freight for his necessary disbursements for incidental expenses, and the liabilities which he contracts for these expenses during the voyage, and also for his own wages. But the Court of Errors of New York recognized the English law, that the master had no lien on the freight, nor on the vessel, for his wages.

4. *Have material men a lien?*—170, *notes.*

It was decided* in the District Court of Maine, that, by the general maritime law of Europe, material men had a privi-

* Davis's R., 71.

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leged lien on a vessel for repairs and supplies, but that, in this country, they had no such lien in a port of the State to which the vessel belonged, unless allowed by the local law; though, if in the port of another State, she was considered a foreign vessel, and the general maritime law applied. In Illinois, by special statute, vessels are liable to be attached for work and supplies by mechanics, etc., in that State. So, also, in New York, Indiana, Pennsylvania, Massachusetts, New Jersey, Ohio, California, and other States, similar enactments have been made.

5. *What is the rule as to the pilotage?*—175.

That it is the duty of the master engaged in a foreign trade, to put his ship under the charge of a pilot, both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment.

6. *How far do the responsibilities of pilots extend?*—176.

The pilot, while on board, has the exclusive control of the ship. He is considered as master, *pro hac vice*, and if any injury or loss be sustained, in the navigation of the vessel while under the charge of pilot, he is answerable as strictly as if he were a common carrier, for his default, negligence, or unskillfulness; and the owner would also be responsible to the party injured by the act of the pilot, as being the act of his agent.

7. *What is the mate of a vessel?*—176.

He is the next officer to the master on board, and upon his death or absence, the mate succeeds, *virtute officii*, to the care of the ship and government of the crew. He is *quasi* master, with the same general powers and responsibilities, *pro hac vice*, and with the preservation of his character and privileges as mate.

8. *What are the principal provisions prescribed by Congress, in regard to seamen employed in the merchant service?*—177, 178.

That every seaman or mariner, on all voyages from the United States to a foreign port, and, in certain cases, to a port in another State, other than the adjoining one, shall sign shipping articles, which are contracts in writing or in print, declaring the voyage and the term of time for which the seamen are

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shipped, and when they are to render themselves on board. If there be no such contract, the master is bound to pay to every seaman who performs the voyage, the highest wages given at that port for a similar voyage within the three next preceding months, besides forfeiting for every seaman a penalty of twenty dollars. The seamen are made subject to forfeitures if they do not render themselves on board according to the contract, or if they desert the service; and they are liable to summary imprisonment for desertion, and to be detained until the ship be ready to sail. If the mate and a majority of the crew, after the voyage is begun, but before the vessel has left the land, deem the vessel unsafe, or not duly provided, and shall require an examination of the ship, the master must proceed to, or stop at, the nearest or most convenient port, where an inquiry is to be made. If the complaint shall appear to be groundless, the expenses and reasonable damages, to be ascertained by the judge, are to be deducted from the wages of the seamen. But if the vessel be found or made seaworthy, and the seamen shall refuse to proceed on the voyage, they are subjected to imprisonment until they pay double the advance made them on the shipping contract. Fishermen engaged in the fisheries are liable to the like penalties for desertion; and the fishing contract must be in writing, signed by the shipper and the fishermen, and countersigned by the owner,

9. *What is provided in regard to wages?*—178.

That one third shall be due at every port at which the vessel shall unlade and deliver her cargo, before the voyage be ended; and at the end of the voyage, the seamen may proceed in the District Court, by admiralty process, against the ship, if the wages be not paid within ten days after they are discharged.

10. *What is provided for the health and safety of seamen?*—179.

That every ship belonging to a citizen of the United States, of the burden of one hundred and fifty tons, or upward, navigated by ten or more persons, and bound to a foreign port; or of the burthen of seventy tons, or upward, and navigated by six or more persons, and bound from the United States to the West Indies, shall be provided with a medicine chest, properly supplied with fresh and sound medicines; and if

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bound across the Atlantic ocean, with requisite stores of water, and salted meat, and wholesome ship bread, well secured under deck. And it is further provided, for the purpose of affording relief to sick and disabled seamen, that a fund be raised out of their wages, earned on board of any vessel of the United States, and be paid by the master to the collector of the port, on entry from a foreign port, at the rate of twenty cents per month for every seaman. It is also made the duty of the American consuls, and commercial agents, to provide for those seamen who may be found destitute within their consular districts, and for their passage to some port in the United States, in a reasonable manner, at the expense of the United States. So, if an American vessel be sold in a foreign port, and her company discharged, or a seaman be discharged without his consent, the master must pay to the consul or commercial agent at the place, three months' pay over and above the wages then due, for every such seaman, two thirds of which is to be paid over to every seaman so discharged, upon his engagement on board of any vessel to return to the United States.

11. *How far has the master authority over the seaman?*—181–183.

He may imprison, and also inflict reasonable corporal punishment upon a seaman, for disobedience to reasonable commands, or for disorderly, riotous or insolent conduct; and his authority, in that respect, is analogous to that of a master on land over his apprentice or scholar. He may discharge a seaman for just cause, and put him on shore in a foreign country; but the cause must not be slight, but aggravated, such as habitual disobedience mutinous conduct, theft, or habitual drunkenness; and he is responsible in damages if he discharge him without justifiable cause. This power extends to the mate and subordinate officers.

12. *What is the maritime law as to the expenses attending sick and disabled seamen during the voyage?*—184.

It has been decided, that the expense of curing a sick seaman in the course of the voyage, was a charge upon the ship, according to the maritime law of Europe.

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13. *What is the rule as to seamen's right to extra wages?*—185.

That every seamen engaged to serve on board a ship is bound, from the terms of the contract, to do his duty in the service to the utmost of his ability, and, therefore, a promise made by the master when the ship is in distress, to pay extra wages as an inducement to extraordinary exertion, is illegal and void. It requires the performance of some service not within the scope of the original contract, as by becoming a voluntary hostage upon capture, to create a valid claim on the part of the seaman to compensation, on a promise by the master, beyond the stipulated wages. So, no wages can be recovered, when the hiring has been for an illegal voyage, or one in violation of a statute.

14. *What is the rule, as to wages, where a seaman is unable to render his service by reason of sickness or bodily injury happening during the voyage?*—186.

He is entitled to his whole wages for the voyage. He will be equally entitled to his wages to the end of the voyage, when wrongfully discharged by the master during the course of it. If the seaman be wrongfully discharged on the voyage, the voyage is then ended with respect to him, and he is entitled to sue for his full wages for the voyage.

15. *What is the general rule as to wages?*—187–189.

The general principle of the marine law is, that freight is the mother of wages, and if no freight be earned, no wages are due. This principle protects the owner, by making the right of the mariner to his wages commensurate with the right of the owner to his freight; but that the rule may duly apply, the freight must not be lost by the fraud or wrongful act of the master. The policy of the rule applies to cases of loss of freight by a peril of the sea. Seamen's wages, in trading voyages, are due *pro rata itineris.*

16. *What is the rule where a seaman dies on the voyage?*—189.

There is no settled English rule on the subject of his wages. In one case, the court intimated that his representatives might be entitled to a proportion of his wages up to his death, when the hiring was by the month. In this country, there have been

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contradictory decisions on the point. In the Circuit and District Courts of the United States, for Pennsylvania, it was decided that the representatives of a seaman dying on the voyage, were entitled to his full wages at the end of the voyage. On the other hand, it was subsequently decided, in the District Court for South Carolina, and in the District Court for Massachusetts, that full wages, by the marine law, meant only the full wages up to the death of the mariner.

17. *What is the rule as to wages, if a ship delivers her outward cargo, and perishes on her return voyage, the outward freight being earned?*—190, 191.

That the seamen's wages on the outward voyage are due; for, by the custom of merchants, seamen's wages are due at every delivering port. And seamen are entitled to their wages, not only when the owner earns freight, but also when, unless for his own act, he might have earned it. Even if the ship perishes on the outward voyage, if part freight has been paid, the seamen are entitled to a proportional part of their wages, for there is an inseparable connection between freight and wages.

18. *What effect has capture upon wages?*—191, 192.

Capture by an enemy extinguishes the contract for seamen's wages. The American decisions allow seamen taken prisoners by the captor, and detained, their wages for the whole voyage, if the same be afterwards performed, with a ratable deduction for expense of salvage. So, of a vessel captured, and afterwards ransomed, and enabled to arrive at her port of destination.

19. *What is the law in cases of embezzlement, or injuries produced by the misconduct of any of the crew?*—194.

They are bound to contribute out of their wages. But the circumstances must be such as to fix the wrong upon some of the crew; and then, if the individual be unknown, those of the crew, upon whom the presumption of guilt rests, stand as sureties for each other, and they must contribute ratably to the loss. If the embezzlement be fixed upon any individual, he is wholly responsible. And in case of uncertainty, the guilt of the par-

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ties is to be established beyond all reasonable doubt, before the contribution can be demanded.

20. *How is the lien of seamen for wages regarded by the marine law?*—196.

Few claims are more highly favored and protected by law, and when due, the vessel, owners, and master, are liable for the payment of them. The seamen need not libel the vessel at the immediate port where they are discharged. They may disregard bottomry bonds, and pursue their lien for wages afterwards, even against a subsequent *bona fide* purchaser. There is no difference in the case of a vessel seized abroad, and restored in specie or in value; the lien attaches to the thing and whatsoever is substituted for it.

21. *What causes work a forfeiture of wages?*—198.

Desertion from the ship without just cause, or the justifiable discharge of a seaman by the master for bad conduct, will work a forfeiture of the wages previously earned. But the forfeiture is saved if the seaman repents, makes compensation or offer of amends, and is restored to his duty.

LECTURE XLVII.

OF THE CONTRACT OF AFFREIGHTMENT.

1. *What is a charter party?*—201.

It is a contract of affreightment in writing, by which the owner of a ship lets the whole, or a part of her, to a merchant, for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

2. *What does the charter party usually contain?*—202.

It describes the parties, the ship, and the voyage, and contains, on the part of the owner, a stipulation as to sea-worthiness, and as to the promptitude with which the vessel shall re-

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ceive the cargo, and perform the voyage, and the exception of such perils of the sea for which the master and ship owners do not mean to be responsible. On the part of the freighter, it contains a stipulation to load and unload within a given time, with an allowance of so many lay, or running days, for loading and unloading the cargo, and the rates and times of payment of the freight, and rate of demurrage beyond the allotted days.

3. *What is the duty of the owner of a chartered ship?*—203.

It is his duty not only to see that she is duly equipped, and in suitable condition to perform the voyage, but he is bound to keep her in that condition throughout the voyage, unless he be prevented by perils of the sea. If, in consequence of a failure of equipment of the vessel, the charterer does not employ her, he is not bound to pay freight; but if he actually employs her, he must pay the freight, though he has his remedy, on the charter party, for damages sustained by reason of the deficiency of the vessel in her equipment.

4. *What is understood by* demurrage?—203.

The extra lay days (being the days allowed to load and unload the cargo) are called days of *demurrage;* and that term is likewise applied to the payment for such delay, and it may become due either by the ship's detention, for the purpose of unloading or loading the cargo, either before, or during, or after the voyage, or in waiting for convoy.

5. *What is the rule as to sea-worthiness?*—204–206.

The owner is bound to see that the ship be sea-worthy, which means that she must be tight, staunch, strong, well-furnished, manned, victualed, and in all respects equipped in the usual manner for the merchant service in such a trade. The ship must be fit and competent for the sort of cargo, and the particular service for which she is engaged. If there should be a latent defect in the vessel, unknown to the owner, and undiscoverable upon examination, yet, the better opinion is, that the owner must answer for the damage occasioned by that defect. The owner is also obliged to see that the ship be furnished with all the requisite papers, according to the laws of the country to

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which she belongs, and according to treaties and the law of nations. And, generally, as a common carrier, he is answerable for all losses other than what arise from the excepted cases.

6. *What is understood by a bill of lading?*—206.

It is an acknowledgment by the master of the receipt of the goods on board, and of the conveyance of them which he assumes.

7. *What does it contain?*—207.

It contains the quantity and marks of the merchandise, the names of the shipper and consignee, the places of departure and discharge, the name of the master and of the ship, with the price of freight. The charter party is the contract for the hire of the ship, and the bill of lading for the conveyance of the cargo. By the bill of lading, the master engages, as a common carrier, to carry and deliver the goods to the consignee, or his order; and by the common law, owners were responsible for damage to goods on board, to the full extent of the loss. There are commonly three bills of lading; one for the freighter, another for the consignee, factor, or agent abroad, and one is usually kept by the captain for his own use. It is the document and title of the goods sent; and, as such, if it be to order, or assigns, is transferable in the market.

8. *What is the effect of an indorsement of the bill of lading?*—207.

The indorsement and delivery of it transfer the property in the goods from the time of delivery. The *bona fide* holder of the bill of lading, indorsed by the consignee, is entitled to the goods, if he purchased it for a valuable consideration.

9. *What are the obligations of the master of a chartered ship during the voyage?*—209.

When the voyage is ready, he is bound to sail as soon as wind and tide will permit; but he ought not to set out in very tempestuous weather. He is bound, likewise, to proceed to the port of delivery without delay, and without any unnecessary deviation from the direct and usual course. If he covenants to go to a loading port, by a given time, he must do it, or abide the

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forfeiture; and if he be forced out of his regular course, he must regain it with as little delay as possible.

10. *What cause will justify a deviation?*—209–212.

Nothing but some necessary cause, as to avoid a storm, or pirates, or enemies, or to procure requisite supplies or repairs, or to relieve a ship in distress. In cases of necessity, as where the ship is wrecked, or otherwise disabled in the course of the voyage, and can not be repaired, or not, under the circumstances, without too great delay and expense, the master may procure another competent vessel to carry on the cargo and save his freight. His duty is to act, in the port of necessity, for the best interest of all concerned, and he has full powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination.

11. *What is the master's duty during the voyage?*—213.

He is bound to take all possible care of the cargo, and is chargeable with the most exact diligence.

12. *What if the ship be captured during the voyage?*—213.

The master is bound to render his exertions to rescue the property from condemnation, by interposing his neutral claims, and exhibiting all the documents in his power for the protection of the cargo.

13. *What is the rule as to the delivery of the goods at the port of destination?*—215.

The general rule is, that delivery at the wharf (when there are no special directions to the contrary) discharges the master. But the reasonable qualification of the rule is, that there must be a delivery at the wharf to some person authorized to receive the goods, or due previous notice must have been given to the consignee of the time and place of delivery; and the master can not discharge himself by leaving them naked and exposed on the wharf. His responsibility will continue until there is actual delivery, or something equivalent thereto, unless the owner of the goods or his agent had previously assumed charge of them; or at least, until the consignee has had notice of the place and

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time of delivery, and the goods have been duly separated and designated for his use.

14. *What causes will excuse the ship-owner and master for the non-delivery of the cargo?*—216.

They are liable as common carriers, in all the strictness and extent of the common law, and can only be excused by events falling within one of the expressions, "act of God, and public enemies," or some cause expressly provided for in the charter party.

15. *What are meant by perils of the sea?*—216.

They denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined by the civil law to be, *quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The case of a ship captured and plundered by pirates, is the only exception to this rule, and that has been adjudged to be a peril of the sea.

16. *Has the liability of ship-owners been recently limited by act of Congress?*—217, *note.*

Yes; by an act passed March 3, 1851, ship-owners are not liable for loss by reason of fire on board their vessel, unless the fire was caused by their design or neglect. Nor are they accountable as carriers for any platina or other precious metals, or any bank bills, unless they be notified in writing by the owners of such articles of their value, and the same be entered on the bill of lading; and then, not beyond the value so notified and entered. The amount of their liability for loss is limited to the value of their interest in the vessel, unless the loss occurred with their knowledge or privity. This act does not extend to canal boats, barges, or lighters, nor to any vessel used in rivers or inland navigation.

17. *What are the duties of the shipper?*—218.

To use the ship in a lawful manner, and for the purpose for which it was let.

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18. *What is meant by freight?*—219.

In the common acceptation of the term, it means the price for the actual transportation of goods by sea from one place to another; but, in its more extensive sense, it is applied to all rewards or compensation paid for the use of ships. As a general rule, the delivery of the goods at the place of destination, according to the charter party, is a condition precedent to entitle the owner of the vessel to his freight.

19. *What is meant by dead freight?*—219.

If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the freight; and this is sometimes termed dead freight, in contradistinction to freight due for the actual carriage of goods.

20. *What is the rule as to the owner's lien for freight?*—220–222.

If there be no express agreement in the case, the master is not bound to part with the goods until the freight be paid, but if he refuses to deliver the goods for other causes than nonpayment of freight, he can not avail himself of the want of tender. When the regulations of the revenue require the goods to be landed and deposited in a public warehouse, the master may enter them in his own name, and preserve the lien. The shipowner's lien for freight is gone when the charterer is constituted owner, and takes exclusive possession for the voyage, or when payment of the freight is, by agreement, postponed beyond the time, or at variance with the time and place, for the delivery of the goods. But without a plain intent to the contrary, the shipowner will not be presumed to have relinquished his lien on the cargo for the freight, notwithstanding he has chartered the vessel to another. But if, instead of letting the use of the ship to freight, the vessel itself be let to hire, with the right to appoint the master, then the charterer becomes owner for the voyage, and the general owner has no lien on the cargo, for the hire of the ship. If the goods by the bill of lading, were to be delivered to B, or his assigns, he or they paying freight, and the assignee receives the goods, he is responsible to the master for

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freight, under the implied undertaking to pay it. So, if the master delivers the goods without payment of freight, he may sue the consignee to whom the goods were delivered. If he can not recover his freight of the consignee, he still has his remedy over on the charter party against the shipper, and the condition precedent to the delivery, inserted in the bill of lading, was intended only for the master's benefit.

21. *What if a ship be prohibited by the government of the country from entering at the port of delivery, and the cargo be brought back?*—222, 223.

If the prohibition took place after the commencement of the voyage, and the cargo be brought back, the freight for the outward voyage has been held to have been earned. Nothing can be more just, observes Valin, than that the outward freight should be allowed in such a case, since the interruption proceeds from an extraordinary cause, independent of the ordinary maritime perils. The case of a blockade or interdiction of commerce with the port of discharge, after the commencement of the voyage, is held to be different; for in that case the voyage is deemed to be broken up, and the charter party dissolved; and if the cargo, by reason of that obstacle, be brought back, no freight is due. The same principle applies, if the voyage be broken up by capture on the passage. On the other hand, an embargo, detaining the vessel at the port of departure, or in the course of the voyage, does not, of itself, work a dissolution of the contract. It is requisite that the ship break ground, to give an inception to freight.

22. *What if the goods become so diminished in value, during the voyage, as not to be worth the freight?*—224, 225.

The consignee is bound to take the goods and pay the freight. The ship-owner performs his engagement when he carries and delivers the goods. The right to his freight then becomes absolute. It may impair the remedy which his lien afforded, but it does not affect his personal demand against the shipper.

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23. *What about the freight, if part of a cargo of live stock die during the voyage?*—225, 226.

If there be no fault on the part of the master or crew, and no express agreement, the general rule is, that freight is to be paid for all put on board; otherwise, if the agreement was to pay for the transportation of the stock.

24. *In what cases does the question of ratable freight arise?*—227–229.

1. When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination. 2. When the ship has not performed her whole voyage, and the goods have been delivered to the merchant at a place short of the port of delivery. In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers. But if the ship be chartered at a specific sum for the voyage, the stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment of freight be claimed except in special cases. Apportionment of freight usually happens, when the ship is forced into a port short of her destination, and can not finish the voyage. If, however, the merchant accepts the goods at the intermediate port, the general rule of the marine law is, that freight is to be paid according to the proportion of the voyage performed, and the law will imply such a contract; and it is now settled in the English and American law, that freight, *pro rata itineris*, is due, when the ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods are there voluntarily accepted by the owner. Such an acceptance constitutes the basis of the rule for a *pro rata* freight.

25. *How is the amount of ratable freight ascertained?*—230.

In this country, by calculating how much of the voyage had been performed when the goods arrived at the port of necessity.

26. *How is a loss by collision adjusted?*—230.

When the fact is clear, that a fault has been committed by

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one party, or that he was wanting in due skill or care, and the loss was the consequence thereof, the party in fault must pay all the damages.

27. *What are the nautical rules by which want of care may be ascertained?*—230, 231.

In most cases they are as follows. The vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it. The vessel on the starboard tack has a right to keep her wind, and the vessel on the larboard tack is bound to give way to the other, or bear up or heave about to avoid danger, or be answerable for the consequences. The vessel to windward is to keep away, when both vessels are going the same course in a narrow channel, and there is danger of running afoul of each other. But in the case of a steam vessel, which has greater power, and is more under command, she is bound to give way to a vessel with sails. Where a collision occurs without fault on either side, or with fault on both sides, neither party can sue the other.

28. *What is meant by* general average?—232.

General, gross, or extraordinary average, means a contribution made by all parties concerned, toward a loss sustained by some of the parties in interest, for the benefit of all; and it is called general, or gross average, because it falls upon the gross amount of the ship cargo, and freight.

29. *What constitutes the ground of a general average?*—233, 234.

That goods must not be swept away by the violence of the waves, for then the loss falls entirely upon the merchant, or his insurer, but they must be intentionally sacrificed by the mind and agency of man, for the safety of the ship and the residue of the cargo. The *jettison* must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of the storm, or is laboring upon the rocks and shallows, or is closely pursued by pirates or enemies; and then, if the ship and the

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residue of the cargo be saved, by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. As a general rule, the crew are not authorized to make a *jettison* without the order of the master. To avoid an absolute shipwreck, it may sometimes be necessary to run the vessel on shore in a place which appears to be the least dangerous; and that will form a case of general average.

30. *What should be thrown overboard first?*—234.

The captain must begin the *jettison* with things the least necessary, the most weighty, and of least value. Nothing but the greatest extremity would excuse the master who should commence the *jettison* with money, and other precious parts of the cargo.

31. *What things are the proper subjects for a general average?*—235–238.

If a ship be injured by perils of the sea, and be obliged to go into port to refit, the wages and provisions of the crew, during the detention, are not the subject of a general average; but the other necessary expenses of going into port, and of preparing for refitting the ship, by unloading, warehousing, and re-loading the cargo, are general average. The cost of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. The wages and provisions of the crew, during capture and detention for adjudication, are the subject of general average; while, in the case of an embargo, they are chargeable exclusively upon the freight. If part of the cargo be voluntarily delivered up to a pirate, or an enemy, by way of ransom or contribution, and to induce him to spare the vessel and the residue of the goods, the property saved must contribute to the loss, as being the price of safety to the rest. If masts, cable and other equipments of the vessel be cut away, to save her in a case of extremity, their value must be made good by contribution.

All casual and inevitable damage and loss, as distinguished from that which is purposely incurred, are the subject of particular and not of general average.

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32. *What goods are subject to contribution, in cases of general average?*—240–242.

The general doctrine is, that all merchandise, of whatever kind or weight, or to whomsoever belonging, contributes. The contribution is made, not on account of incumbrance to the ship, but of safety obtained, and, therefore, bullion and jewels put on board as merchandise, contribute according to their full value. Wearing apparel and things taken on board for private use do not contribute, in case of general average. The common rule, according to Magens, is, that what articles pay freight must contribute, and what pay no freight pay no average. Instruments of defense and provisions do not contribute, nor do wages of seamen contribute, except in the single instance of the ransom of the ship. Goods sold for the necessities of the ship are the subject of general average.

33. *What is the general rule for settling general average?*—242.

That the goods sacrificed, as well as the goods saved, are to be valued at the clear net price they would have yielded, after deducting freight, at the port of discharge. The value of the vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear and tear on the voyage up to the time of the disaster.

34. *What is meant by salvage?*—245.

The compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or re-capture.

35. *What amount is usually allowed for salvage?*—245, *n.*–246.

The courts are liberal in the allowance of salvage in meritorious cases, as a reward for the service, and as an incentive to effort; and the allowance used to fluctuate between one half, one third, and one fourth of the net proceeds of the property saved, but adequate remuneration, in view of all the circumstances, is the true rule. In general, neither the master, nor a passenger, seaman, or pilot, is entitled to compensation, in the way of salvage, for the ordinary assistance he may afford a ves-

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sel in distress. Yet, if the ship has been abandoned so as to discharge a seaman from his contract, and he subsequently contributes to the preservation of the vessel, he will be entitled to salvage.

38. *What will work a dissolution of the contract, of affreightment, without a performance?*—248, 249.

If the voyage becomes unlawful, or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. But a temporary impediment of the voyage does not work a dissolution of the charter party, and an embargo has been held to be such a temporary restraint, though it be indefinite as to time.

LECTURE XLVIII.

OF THE LAW OF MARINE INSURANCE.

1. *What is marine insurance?*—253, *n.* 1.

It is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils, or sea risks, to which his ship, freight, and cargo, or other interest, or some of them, may be exposed, during a certain voyage, or a fixed period of time.

2. *Who may be insured?*—253.

All persons whether aliens or natives, except alien enemies.

3. *Who may be insurers?*—256, 257, *n.* (*b.*)

Any individuals, or companies, or partnerships, may lawfully become insurers. In New York and other States, marine insurance, or lending on *respondentia* or *bottomry*, effected within the State, is prohibited to all persons and companies residing in any foreign country, acting by agent here. Persons and associa-

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tions, residing in other States, effecting such insurances in New York, are taxed ten per cent. on their premiums.

4. *What if in the terms of the contract, a ship be specified?*—257.

It becomes a part of the contract, and no other ship can be substituted without necessity; but the cargo may be shifted from one ship to another, if done from necessity, and the insurer of it will be still liable.

5. *What does an insurance on the body of a ship include?*—257.

It sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship, except when varied by special agreement. This doctrine is taught by all the continental writers on insurance, as well as in the English law

6. *What if a partner insure in his own name only?*—258.

It will cover his undivided interest in the partnership, and no more. If the policy has the words, *and whomsoever it may concern*, then it will cover the whole partnership interest.

7. *To whom only will those general words*, whomsoever it may concern, *apply?*—258.

To the person having an interest in the subject insured, and who was in the contemplation of the contract.

8. *Will a policy on a voyage from abroad be good, if it omit to name the ship, or master, or port of discharge, or consignee, or nature of the cargo?*—259.

It may, for all these may be unknown to the insured when he applies for insurance.

9. *What if a policy be part written and part printed, and there should arise a reasonable doubt upon the meaning of the contract?*—260.

The greater effect is to be attributed to the written words. All mercantile contracts, if dubious, or made with reference to usage, may be explained by parol evidence of the usage; but with this limitation, that the usage, to be admissible, must be

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consistent with the principle of law, and not go to defeat the essential provisions of the contract.

10. *What if an agent effects a policy for his principal without his knowledge?*—260, 261.

If the principal afterwards adopts the act, the insurer is bound; but if it be not adopted, the contract is not binding.

11. *Is a merchant who has effects of his foreign correspondent in his hands, or who has been in the habit of insuring for him, bound to comply with an order to insure?*—261.

He is, and the order may be implied, in some cases, from the previous course of dealing between the parties.

12. *What if the agent neglects, or imperfectly executes the order?*—261.

He is answerable as if he himself was the insurer, and is entitled to the premium.

13. *What if the subject-matter of the policy be assigned?*—261.

The policy may also be assigned, so as to give a right of action to the assignee.

14. *What is the proper subject of insurance?*—262.

Lawful property engaged in lawful trade.

15. *Is a policy on a voyage undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, legal?*—262.

It is not, whether the policy be on the ship, freight or goods embarked in the illegal traffic. An insurance on property, intended to be exported or imported contrary to the law of the place where the policy is made, or sought to be enforced, is void.

16. *Is insurance on a smuggling voyage, prohibited only by the law of the foreign country where the ship has traded, or intends to trade, valid?*—266.

It is, if the insurer was fully informed, when he entered into the contract, of the nature of the trade. But insurance to a port does not include the risk of going into the port in viola-

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tion of law, unless the peril of illicit entry at the port be also within the provision or contemplation of the policy.

17. *Is the insurance by a neutral, of goods usually denominated contraband of war, valid?*—267, 268.

It is, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. Illicit voyages may be ranked in several classes:

1. When the sovereign of the country, to which the ship belongs, interdicts trade with a foreign country or port, in which case, a voyage, for the purpose of trade, would be illegal, and all insurances thereon void.

2. Where the trade in question is prohibited by the trade laws of a foreign State; and in that case, the voyage, in such trade, may be the subject of insurance in any State in which the trade is not prohibited, for the municipal laws of one jurisdiction have no force in another.

3. When neutrals transport to belligerents goods contraband of war. The law of nations does not go to the extent of rendering the neutral shipper of goods contraband of war an offender against his own sovereign. An insurance, then, by neutrals in a neutral country is valid, whether it relates to an interloping trade in a foreign port, illicit *lege loci*, or to a trade in transporting contraband goods, which is illicit *jure belli*. But to render the insurance valid, in either case, the insurer should be informed of the nature of the trade and goods.

18. *For what reason have the Ordinances generally prohibited the insurance of seamen's wages?*—269.

From the consideration, that if the title to wages did not depend upon the earning of freight by the performance of the vogage, seamen would want one great stimulus to exertion in times of difficulty and disaster.

19. *What is the doctrine as to insuring freight?*—269, 270.

In France and Spain, freight not earned can not be insured, and for the same reason that seamen's wages are not insurable; freight already earned may be insured. In England, and in the United States, future, or expected and contingent, and even

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dead freight, is held to be an insurable interest. It is necessary, however, that the ship have actually begun to earn freight. An inchoate right to freight is an insurable interest.

20. *When does the risk generally begin?*—270.

From the time the goods, or a part of them, are put on board; and if the ship has been let to freight under a charter party of affreightment, the right to freight commences, and is at risk, so soon as the ship breaks ground; and if the charterer omits to put on board the expected cargo, and the ship performs the voyage in ballast, the right to freight is perfect.

21. *Are profits a proper subject of insurance?*—271.

They are; the right to insure expected or contingent profits is settled in England, and has received repeated and elaborate confirmation. They are, likewise, in this country, held to be an insurable interest. In France insurances on profits are unlawful.

22. *What is an open policy?*—272.

It is one in which the amount of interest is not fixed by the policy, but is to be ascertained by the insured, in case a loss should happen.

23. *What is a valued policy?*—273.

It is where the value has been set on the ship or goods insured, and inserted in the policy, in the nature of liquidated damages.

24. *What is the effect of an excessive or fraudulent valuation?*—273.

A valuation, fraudulent in fact, as respects the insurer, or so excessive as to raise a necessary presumption of fraud, entirely vacates the policy.

25. *Does the valuation apply to partial losses?*—274, *n.* 2.

The better opinion is, that in settling all losses, total or partial, the valuation of the property in the policy is to be con-

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sidered as correct in the adjustment of the loss. And it has been so decided by the House of Lords in England.

26. *What if there be certain articles comprised in the valuation, and part of them are safely landed before the ship is lost?*—275.

The valuation must be opened, and the claim of the insured reduced in the proportion which the articles actually lost bore to the valuation of the whole at the commencement of the risk.

27. *What is a wager policy?*—275.

A policy on a mere hope or expectation, without any interest in the subject-matter.

28. *What interest is sufficient to maintain a policy?*—275, 276.

If a person be directly liable to loss on the happening of any particular event, he has an insurable interest. A creditor, to whom property is assigned, as collateral security, has an insurable interest to the amount of his debt. Commissions to become due to public agents, and all reasonable expectations of profits, are insurable interests. Interest does not necessarily imply a right to, or property in the subject insured.

29. *Are wager policies lawful in this country?*—278.

They are unlawful in New York, and, it seems, in Massachusetts and Pennsylvania.

30. *What is a re-assurance?*—278–280.

It is where, after an insurance has been made, the insurer hath the entire sum re-assured to him by some other insurer; this species of insurance is prohibited in England, but allowed with us. The first insurer may re-assure to the same amount; but the better opinion is that he can not insure the premium due him for the first insurance. The insured may likewise insure the solvency of the first insurer.

31. *What is a double insurance?*—280.

It is where the insured makes two insurances on the same

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risk and the same interest. But the law will not allow him to receive a double satisfaction, though he may sue on both the policies. The underwriters on both the policies are bound to contribute ratably toward the loss.

32. *What is the rule for contribution in cases of double insurance?*—281.

It was declared by the Circuit Court of the United States that the insurers pay according to the rate of their subscriptions, without regard to the order of time in which the policies were made, and if the insured recovers his whole loss from one set of underwriters, they will be entitled to their action against the other insurers, on the same interest and risk, for a ratable proportion of the loss. The French rule is, that if there exist several contracts of insurance on the same interest and risk, and the first policy covers the whole value of the subject, it bears the whole loss, and the subsequent insurers are discharged on returning all but one half per cent. premium. The ancient rule in England was according to the French ordinance.

33. *What if two policies be dated on the same day?*—281.

The policy first in point of fact must bear the loss.

34. *What is the usage of the companies in New York, in regard to partial losses?*—282.

That they are to be apportioned between the policies, without regard to dates, provided the cargo on board was large enough to have attached both policies. This is the French rule.

35. *What are the effects of a misrepresentation while effecting a policy of insurance?*—282–284.

It is an established principle that a misrepresentation to the underwriter, or the concealment of a fact material to the risk, will avoid the policy; and this, though loss arose from a cause unconnected with the misrepresentation, and even though the misrepresentation or concealment was without any fraudulent intention.

A representation to the first underwriter in favor of the risk, extends to all subsequent underwriters. This rule is strictly con-

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fined to representations made to the first underwriter, and does not extend to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel, and against the same risks.

36. *What is the general duty of a person seeking to effect an insurance?*—285.

To communicate every species of intelligence which he possesses which may affect the mind of the insurer, either as to the point whether he will insure at all, or as to the rate of premium.

37. *What is meant by the warranty of sea-worthiness?*—287, 288.

That the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. This warranty of sea-worthiness relates to the commencement of the risk, and the warranty is not broken if she becomes unseaworthy afterwards.

38. *What is the effect of the breach of the implied warranty of sea-worthiness in the course of the voyage?*—288.

It has no retrospective operation, and does not destroy a just claim to damages for losses occurring prior to the breach of this implied condition.

39. *How is every warranty considered?*—288.

As a part of the contract, and it is either express or implied. If it be an express warranty, it must appear on the face of the policy. Any statement or averment of a fact, or any undertaking or description on the part of the insured on the face of the policy, which relates as a matter of fact to the risk, amounts to a warranty. It differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and liberal performance. Whether the thing warranted be material or not, and whether the loss happened by reason of a breach of the warranty, or did not, is immaterial. A breach of it avoids the contract, *ab initio*.

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40. *What is the effect of a survey?*—289.

If it be made within a reasonable time after the determination of the voyage, and if the survey states that the vessel was condemned solely on account of rottenness existing at the time of the survey, it is a conclusive bar to the assured.

41. *What are the most usual express warranties?*—289.

That the ship was safe at such a time, or would sail by such a day, or would sail with convoy, or a warranty against illicit trade, or that the property insured is neutral.

42. *What are the risks usually insured against?*—291.

The general rule is, that the insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage; but the enumerated list may be enlarged or abridged at the pleasure of the parties.

43. *May a person insure against a loss by reason of the acts of his own government, as an arrest, or embargo?*—291, 292.

He may, and there is no distinction on this point between a foreign and a domestic embargo; if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve the contract of insurance, and the insured may abandon as for a total loss.

44. *Is an interdiction of commerce with the port of destination, or a denial of entry by the power at the port, or by blockade, a loss within the policy?*—293, 294.

There are conflicting decisions on the point, but the doctrine best supported by authority is, that if the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy.

45. *To what does a warranty against illicit trade apply?*—294.

Only to seizures for breaches of the laws of trade, and the commercial regulations of ports. It does not extend to seizures for offenses against the law of nations, nor to acts of lawless violence, though committed under a pretext of some municipal regulation; nor to arbitrary seizures under the pretense of illicit trade, when in fact no such trade existed.

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46. *What is the practice with regard to goods of a perishable nature?*—294.

It has been the practice to introduce into policies a stipulation, by way of memorandum, that upon certain enumerated (commonly called, memorandum) articles, the insurer should not be liable for any partial loss whatever, and upon others for none under a given rate per cent.

47. *What is the established rule, if the loss of memorandum articles be partial?*—294–299.

That the underwriter pays nothing; and it is partial only, when part of the cargo arrives in safety, however deteriorated in value, though another part of the cargo had been wholly destroyed by disasters on the voyage.

48. *What are the usual perils covered by the policy?*—299.

All those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist.

49. *Is the destruction of the ship by worms within perils of the sea insured against?*—300.

It is not; nor the loss of an anchor by the friction of rocks, nor the wear and tear of the equipment of the ship, nor the diminution of liquids by ordinary leakage, nor hemp taking fire in a state of effervescence, nor injury done to the ship by rats.

50. *After what length of time shall a missing vessel be presumed to have perished by the perils of the sea?*—301.

There is no precise time fixed by the English law. In the French law, a vessel not heard from is presumed to have been lost, after the expiration of one year in ordinary voyages, and two in long ones. By the ordinance of Hamburg, a ship was presumed to be lost, if bound to any place in Europe, and not heard from in three months, and by the *Recopilacion des Loyes de Indias*, in Spain, if not heard from within a year and a half. In the case of missing vessels, the loss is presumed to have happened immediately after the date of the last news.

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51. *If a ship be driven ashore by the wind, and in that situation is captured by an enemy, to which is her loss attributed?*—302.

To the capture; for the peril, whatever it may be, upon which the policy attaches, must be the proximate, and not the remote cause of the loss.

52. *What if a partial loss be followed by a total loss?*—302.

The former may be considered as merged in the latter.

53. *What do the enumerated perils of pirates, rovers, and thieves, include?*—303, *n.* (*o.*)

The wrongful and violent acts of individuals, whether in the open character of felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore. In New York it has been held that an insurance against thieves, and barratry of the master and crew, covered a loss by simple theft, unaccompanied with force.

54. *To what does the stipulation of indemnity against all takings at sea, arrests, restraints, and detainments of all kings, princes, and people, refer?*—303.

Only to the acts of government for government purposes, whether right or wrong.

55. *What is the effect of an arrest in the domestic port?*—303, 304.

If made after the voyage is commenced it justifies an abandonment; but if made before the risk commenced, the contract is discharged. An arrest by admiralty process, at the instance of an individual, on a private claim, is not a case within the policy.

56. *How far is the insurer liable under the insurance against fire?*—304.

It is held, that if the ship be burnt under justifiable circumstances, to prevent capture, or from an apprehension of a contagious disease, the insurer is liable. If sails and rigging, put on shore while the vessel is repairing at a foreign port, be burnt, they are covered by the policy. It has likewise been held,

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after a learned discussion, that the insurer is answerable for a loss by fire occasioned by the negligence of the master and mariners.

57. *What is barratry?*—305.

It means fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views.

58. *What time is included in a policy, insuring* "at and from?" —307.

All the time the ship is in port after the policy is subscribed, if the ship be at home; and if abroad, it commences, according to a decision in Pennsylvania, only from the time she has been moored twenty-four hours in safety after her arrival. But if a ship be expected to arrive at a foreign port, and be insured *at and from that place*, or *from her arrival* there, other cases say the risk attaches from her first arrival. The risk continues during quarantine, though after the twenty-four hours. The precise meaning of the words "at and from" is somewhat uncertain.

59. *What if the policy be to a country generally, as to Jamaica?* —308, 309.

The risk ends at the first port made for the purpose of unloading, after the vessel has been moored there twenty-four hours in safety. But in France, where insurances are generally made to the *French West India Islands*, the risk continues until the cargo is discharged at the last place of destination.

60. *When does the risk on the cargo commence?*—309.

Usually from the loading thereof aboard the ship; and it continues while the cargo is on board and no longer, unless the policy covers the risk upon the goods until safely landed, in which cases it continues during their passage to the shore.

61. *At what time does the risk begin in insurances on freight?*— 311.

Usually from the time the goods are sent on board, and not

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before. But if the ship, sailing under contract, be lost on her way to the port of lading, or at the port of lading to which she had arrived in ballast, before any goods are put on board, or when part only of the cargo is on board, and preparation making to receive passengers, the insurer on freight and passage money is liable.

62. *What is the effect of* deviation?—312.

If the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged; not indeed from loss occurring previous to the deviation, but from all subsequent losses.

63. *What if there be several ports of discharge mentioned in the policy, and the insured goes to more than one?*—314, 315.

He must go to them in the order in which they are named in the policy, or if they be not specifically named, he must generally go to them in the geographical order in which they occur, though there may be cases in which he is not bound to follow such order.

64. *What if the ship quits, from necessity, the course described in the policy?*—315.

She must pursue such new voyage of necessity, in the direct course, and in the shortest time, or it will amount to a deviation.

65. *What if the vessel have liberty to carry letters of marque?*—316.

She may deviate for the purpose of defense, but not for the purpose of capture. In *Haven* v. *Holland*,* a pretty enlarged discretion, for the purpose of capture, was confided to the captain, as to the best mode of defense, and it was held that the letter of marque might chase and capture hostile vessels in sight, in the course of the voyage. If liberty be given her to *chase and capture*, that will not enable her to convoy her prize into port, though she may do it, if she be not thereby led out of her

* 2 Mason, 280.

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way; and to cruise for six weeks, means six consecutive weeks, and not at different times.

66. *What is a total loss within the meaning of the policy?*—318.

It may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated. It is a constructive total loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner.

67. *What may the insured do in such a case?*—318.

He may abandon all his interest in the subject insured to the insurer, and call upon him to pay as for a total loss.

68. *What is the effect of an abandonment?*—319.

It has a retrospective effect, and does of itself, and without any deed of cession, transfer the right of property to the insurer to the extent of the insurance.

69. *Within what time, after information of the loss, must the abandonment be made, in order to charge the underwriter with a constructive total loss?*—320.

As soon as the insured is informed of the loss, he ought (after being allowed a reasonable time to inspect the cargo, and for no other purpose) to determine promptly whether he will elect to abandon; and he can not lie by to speculate on events. And the same principle requires an insurer, who rejects an abandonment, to act promptly.

70. *What kind or extent of loss will give a right to abandon?*—321, 322.

The right of abandonment does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or voyage, or both. If the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense. Such are

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the common cases of embargoes, captures, or detainments by princes. It exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner; as in the cases of submersion, shipwreck or capture; or when the risk and expense of restoring the vessel are disproportioned to the expected benefit and objects of the voyage. Each case will be governed on a reasonable view of its special circumstances.

71. *In what cases does the French Ordinance of the Marine allow of an abandonment?*—322.

In cases of capture, shipwreck, stranding with partial wreck, disability of the vessel occasioned by perils of the sea, arrest by a foreign power, or arrest on the part of the government of the insured after the commencement of the voyage, and a loss or damage of the property insured, if amounting to at least three fourths of its value.

72. *What is shipwreck?*—323, *n.* (*c.*)

There are two kinds: 1. When the vessel sinks or is dashed to pieces. 2. When she is stranded, that is, when she is grounded and fills with water. The latter may or may not justify an abandonment.

73. *How about abandonment of cargo?*—326, *n.* 1.

There is a material difference between an insurance on ship and on cargo, and some confusion is introduced by blending the cases; but the essential principles of abandonment, with some variation, apply to each case. "An insurance on goods," says Arnould, "is a contract to indemnify the insured for any loss he may sustain by his goods being prevented by the perils of the seas from arriving in safety at their port of destination."

74. *What is the rule for ascertaining the value of the ship, and the* quantum *of expense or injury?*—330, 331.

The valuation in the policy is conclusive in case of a total loss, but in some respects it is inapplicable for the purposes of ascertaining the *quantum* of injury, in case of a partial loss of goods. The rule in that case is, to ascertain the amount of injury by the difference between the gross proceeds of the sound and damaged goods. The value of the ship at the time and

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place of the accident is the true basis of calculation as to her damage.

75. *How is the master affected by a valid abandonment?*—331.

He becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them.

76. *What is the doctrine, as regards the freight of an abandoned ship?*—333, 334.

It has been a controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and of Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to the disaster was to be retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris;* and that the freight subsequently earned went to the insurer on the ship.

77. *What is the rule for the adjustment of partial losses?*—335–337.

In an open policy the general rule is, that the actual or market value of the subject insured, is to be estimated at the time of the commencement of the risk. The object of inquiry is, the true value of the subject put at risk, and for which an indemnity was stipulated; and the question of total or partial loss does not turn on the estimated value, in a valued policy, but upon a view of all the circumstances attending the loss.

If goods arrive damaged at the place of destination, the way to ascertain the quantity of the damage either in open or valued policies, is to compare the market price or gross amount of the damaged goods, with the market price or gross amount at which the same goods would have sold if sound. But this mode of adjustment affords no perfect indemnity to the insured, for he has to pay freight for the goods as if they were sound, and which freight he can not recover of the insurer. The true way to avoid the inconvenience is to insure the sum to be paid for the freight and charges at the port of delivery.

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78. *What is the rule as to return of premium?*—341.

If the insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and this proceeds through mistake, or misinformation, or any other innocent cause, the premium is to be returned. If the risk has not been run, whether it be owing to the fault, or pleasure, or will of the insured, or to any other cause, the premium must be returned. If the vessel never sailed on the voyage insured, or the policy became void by failure of the warranty, and without fraud, the policy never attached; but if the risk has once commenced, though the voyage be immediately thereafter abandoned, there is to be no return or apportionment of premium. And if the premium is returned, it is the usage in every country where it is not otherwise expressly stipulated in the policy, for the insurer to retain one half per cent. by way of indemnity for his trouble and concern in the transaction. And the insurer retains the premium in all cases of actual fraud on the part of the insured or his agent. So, if the trade be in any respect illegal, the premium can not be reclaimed.

LECTURE XLIX.

OF MARITIME LOANS.

1. *What are maritime loans called?*—353.

Contracts of *bottomry* and *respondentia*. They are loans of a very high and privileged nature, and are always upheld by the admiralty with a strong hand, when entered into *bona fide* and without any suspicion of fraud.

2. *What is a* bottomry bond?—353, 354.

It is a loan of money upon the ship, or ship and accruing freight, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a specific voyage, or for a definite period.

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It is in the nature of a mortgage, by which the ship-owner, or the master on his behalf, pledges the ship as a security for the money borrowed, and it covers the freight of the voyage, or during the limited time.

The object of hypothecation bonds is to procure the necessary supplies for ships which happen to be in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by such instruments, the vessels and their cargoes must be left to perish. The authority of the master to hypothecate the ship and freight, and even the cargo, in case of necessity, is indisputable.

3. *What is a* respondentia bond?—354, 355.

It is a loan upon the pledge of the cargo, though an hypothecation of both ship and cargo may be made in one instrument; and generally, it is only a personal obligation upon the borrower, and is not a specific lien upon the goods, unless there be an express stipulation to that effect in the bond; and it amounts, at most, to an equitable lien on the salvage in case of loss. The condition of the loan is, the safe arrival of the subject hypothecated, and the entire principal and interest are at the risk of the lender during the voyage, as to the perils enumerated, but not as to those arising from fault of the master or owner. If the subject pledged be lost, the lender shall be repaid only to the extent of what remains; but if the subject arrives safe, or if it shall not have been injured, except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on, and for the repayment, the person of the borrower is bound, as well as the property pledged.

4. *Are wagers on* bottomry *and* respondentia bonds *illegal?*—356, *n.* (*f.*)

By the New York revised statutes they are excepted from the prohibition of wager contracts.

5. *When can the master of a ship take up money on* respondentia *or* bottomry?—356, 357.

The general rule is, that this power exists only after the

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voyage has commenced, and is to be exercised in some port where the owner does not reside. The master can not hypothecate for a preëxisting debt, and the necessity of the loan must be shown to have existed at the time it was made, and that the master had no other means of raising the money at marine interest; and when that fact is established, the misapplication of it by the master, without the knowledge and assent of the lender, will not affect its validity.

6. *What if, after money has been taken up on* respondentia, *and before the risk commenced, the voyage is broken up?*—357.

The marine interest depends entirely upon the risk, and therefore, if the proposed voyage be abandoned before the risk has attached, the contract is turned into a simple and absolute loan at ordinary and legal interest.

7. *What if the borrower had not goods on board the ship to the value of the sum borrowed?*—357.

The contract, in case of loss, is reduced in proportion to the diminished value, and the borrower is bound at all events to return the surplus of the sum borrowed with the ordinary interest. The maritime interest is in a ratio to the maritime risk, or value of the goods shipped.

8. *Why is it, that a bond fairly given at a foreign port, under pressure of necessity, is entitled to priority of payment over one of a former date?*—358.

The equity of it consists in this, that the last loan furnished the means of preserving the ship, and without it, the former lenders would entirely have lost their security, and therefore it supersedes a prior mortgage as well as any other prior lien.

9. *May the lender upon* respondentia *or* bottomry *insure the money lent?*—358.

He can insure the principal, but not his maritime interest.

10. *Will a constructive total loss discharge the borrower on* bottomry?—359.

It will not. Nothing but an utter annihilation of the subject hypothecated will discharge him.

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11. *What is the rule as to the liability of the lender on* bottomry *or* respondentia, *to contribute in case of general average?*—360.

In England, except on India risks, the lender does not contribute. This is contrary to the maritime law of France and of other parts of Europe, and in Louisiana we have a decision against it. The new French law, contrary to the ordinance of 1681, charges the lender with simple average, on partial losses, unless there be a positive stipulation to the contrary; but such a stipulation, to exempt him from gross or general average, would be void and contrary to natural equity. The reason of the thing is in favor of the right of making the lender chargeable with his equitable proportion of an average contribution.

12. *What if the ship or cargo be lost, not by perils of the sea, but by default of the borrower, or master?*—360.

The hypothecation bond is forfeited and must be paid.

13. *What if the ship be lost on the voyage, and the cargo forwarded by another ship?*—360.

The borrowers in that case must pay the debt.

14. *Is the doctrine of seaworthiness, deviation, and the necessity of diligence on the part of the borrower, applicable to* respondentia *and* bottomry *bonds?*—360.

It is equally applicable to these contracts as to that of insurance.

15. *Is a loan on* bottomry *or* respondentia *good, if the ship or goods be already at sea when it is effected?*—361.

It has been held good by the Supreme Court of the United States.

16. *When does the maritime interest cease?*—362.

After the risk has ceased, by the safe arrival of the ship, marine interest ceases, and gives place to ordinary legal interest on the aggregate amount of the debt due, consisting of the money lent with maritime premium.

17. *Are seamen's wages a legal subject for* bottomry *or* respondentia *loans?*—363.

They are not.

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LECTURE L.

OF INSURANCE OF LIVES AND AGAINST FIRE.

1. *What is the nature of the contract of insurance upon lives?*—365.

These are liberal contracts, and while they create an advantageous investment of capital, they operate benevolently toward the public. Their usual purpose is to provide a fund for creditors, or for family connections, in case of death. The insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of a person whose life is insured. The insurance is either for the whole term of life, or for a limited period. Such is the nature of these contracts, that they are well calculated to relieve the more helpless members of a family from a precarious dependence, resting upon the life of a single person; and they very naturally engage the attention, and influence the judgment of those thinking men who have been accustomed to reflect deeply upon the past, and to form just anticipations of the future.

2. *When did life insurance in England commence?*—367.

With the Amicable Society, in the beginning of the last century; and in 1827, there were, in the United Kingdom, forty-four life insurance companies.

3. *Who may effect a life insurance?*—368.

A party may insure his own life for the benefit of heirs or creditors, or he may insure the life of another in which he may be interested, and assign the policy to those who have an interest in the life.

4. *What is an insurable interest in the life of another person?*—368, 369, *and notes.*

It must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent. But a child sup-

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ported by his father, and dependent on some fund terminable by his death, has an insurable interest in his father's life.

By statute law in New York, Vermont, New Hampshire, Connecticut, New Jersey, Wisconsin and Rhode Island, married women may, under certain restrictions, insure for their own benefit their husbands' lives; and in Vermont, an unmarried female can insure the life of her father or brother.

5. *What about representations while effecting a life policy of insurance?*—370.

The same good faith is as requisite in this as in all other policies; and whether the suppression arises from fraud or accident is quite immaterial, if the fact be material to the risk, and that is a question for a jury.

6. *What is undertaken by the underwriter on an insurance against fire?*—370.

He undertakes, in consideration of the premium, to indemnify the insured against all losses in his houses, buildings, furniture, ships in port, or merchandise, by means of accidental fire happening within a prescribed period.

7. *What is a sufficient interest in the property to support an insurance against fire?*—371, 372.

A creditor may have a policy on the house and goods of his debtor, upon which he has a lien or mortgage security. So, a trustee, or agent, or factor, who has the custody of goods for sale on commission, may insure them, and a *bona fide* equitable interest may be insured. And in New York it has been held, that a commission merchant, consignee, or factor, can insure goods, in his possession, of the consignor or principal, not merely to the extent of his commission, but to the full value of the goods, without reference to his lien. But it is usually made a condition in American policies, that goods held in trust, or on commission, must be insured *as such*, or they will not be covered by the policy.

8. *What is the insured bound, in good faith, to disclose to the insurer?*—373.

Every fact material to the risk, and within his knowledge

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and which, if stated, would influence the mind of the insurer in making or declining the contract.

9. *What is the rule as to the assignment of policies?*—375.

Fire policies usually contain a prohibition against the assignment of them, without the previous consent of the company. But without this clause, they are assignable in equity like other *choses in action*, though to render the assignment of any value to the assignee, an interest in the subject-matter of the insurance must be assigned also. This restriction upon assignments of the policy applies only to transfers before a loss happens; and it applies only to voluntary sales, and not to sales on execution.

10. *How are settlements of losses by fire made?*—375.

They are made on the principle of particular average, and the estimated loss is paid without abandonment of what has been saved. Damages and reasonable charges on removing, at a fire, articles insured, are covered by the policy. So there may be a general average for a sacrifice made by the insured for the common good, in a case of necessity. It is analogous to the law of contribution by co-securities.

11. *How are losses certified?*—376, *n.* 2.

Upon oath; and the certificate of a magistrate, notary, or clergyman, is made necessary to be procured in favor of the truth and fairness of the statement of the loss, and a strict and literal compliance with the terms of the conditions is held indispensable to the right of recovery. But the terms of the policy respecting notice are to have a reasonable interpretation.

The contract is confined to the parties, and, as a general rule, no equity attaches upon the proceeds of policies, in favor of third persons who, in the character of grantee, mortgagee or creditor, may sustain loss by the fire, without some contract or trust to that effect.

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LECTURE LI.

OF THE FOUNDATION OF TITLE TO LANDS.

1. *Upon the introduction of the feudal tenures, what became a fundamental maxim of the English law in relation to title to land?* —378, *n.* (*b.*)

That the king was the original proprietor of all the land in the kingdom, and the only true source of title. In this country we have adopted the same principle, and applied it to our own republican governments; and it is a settled fundamental doctrine with us, that all valid individual title to land, within the United States, is derived from the grant of our local governments, or from the United States, or from the crown or royal chartered governments established here prior to the Revolution. This doctrine was declared in New York, and several other States, and it was held to be the settled rule, that the courts could not take notice of any title not derived from our own State or colonial government, and duly verified by patent. In a recent case, however, it seems to have been looked on as settled law, that purchases made at Indian treaties, with the approbation of the government agent, carry a valid title without the necessity of a patent from the United States.* This decision is contrary to all previous ones.

2. *By what right did the European nations claim to have dominion on this continent?*—379, 380.

By right of prior discovery; which discovery was considered to have given to the government, by whose subjects or authority it was made, a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendency was asserted, in consequence of the

* See *Coleman* v. *Doe*, 4 Smedes & Marshall, 40.

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superior genius of the Europeans, founded on civilization and Christianity, and of their superiority in the art of war. The European nations, which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil at their will, except to the government claiming the right of preëmption. The practice of Spain, France, Holland, and England, proved the very general recognition of the claim and title to American territories given by discovery. The United States have adopted the same principle; and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.

8. *What has the Supreme Court of the United States decided regarding the Cherokee nation?*—382.

A majority of the court held,* that the Cherokee nation of Indians, dwelling within the jurisdictional limits of the United States, was not a *foreign* State, in the sense in which the word is used in the Constitution, nor entitled as such to proceed in that court against the State of Georgia. But it was admitted that the Cherokees were a *State*, and recognized, in treaties, as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. The court considered them as domestic, dependent nations, whose relation to us resembled that of a ward to his guardian; and it was held, that their right to the lands they occupied was unquestionable, until it should be extinguished by a voluntary cession to our government.

The court, in another case,† re-affirmed the same doctrine, and declared null and void several acts passed by the State Legislature of Georgia, depriving by force the Indians of their lands and gold mines, and prohibiting them from the exercise of any political power whatever.

* 5 Peter's R., 1. † 6 Peter's, R. 515.

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4. *Upon what basis did the people of the New England colonies settle their towns?*—391–399, *n.* (*a.*)

They settled all their towns upon the basis of a title procured by fair purchase from the Indians, with the consent of government, except in a few instances of lands acquired by conquest, after a war deemed to have been just and necessary. Most of the other colonies proceeded on a like principle, and prohibition of individual purchases of lands has since been made a constitutional provision in the States of New York, Virginia, and North Carolina. And the government of the United States until the year 1830, pursued a system of pacific, just and paternal policy towards the Indians, never insisting upon any other claim to their lands than the right of preëmption upon fair terms. Since then the federal government seems to have adopted a different policy, in one instance expelling Indians by military force from their lands, and, in what is now known as the *Indian Country*, introducing the criminal laws of the United States.

LECTURE LII.

OF INCORPOREAL HEREDITAMENTS.

1. *Of what do things real consist?*—401.

Of lands, tenements, and hereditaments.

2. *What is an hereditament?*—401.

Any thing capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed.

3. *What does the term "real estate" mean?*—401.

An estate in fee or for life in land, and it does not comprehend terms for years, or any interest short of a freehold.

4. *What is a tenement?*—401.

A tenement comprises every thing which may be holden so as to create a tenancy, in the feudal sense of the term, and, no

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doubt, it includes things incorporate, though they do not lie in tenure.

5. *What are corporeal hereditaments?*—401.

They are confined to land, which, according to Lord Coke, includes not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses, and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include every thing terrestrial under or over it.

6. *What are incorporeal hereditaments?*—402.

Certain inheritable rights which are not, strictly speaking, of a corporeal nature, or land, although they are by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or which concern them. They pass by deed, without livery, because they are not tangible rights.

7. *What are the principal incorporeal rights which subsist in our law?*—403.

1. Commons. 2. Ways, easements, and aquatic rights. 3. Offices. 4. Franchises. 5. Annuities. 6. Rents.

8. *What is a right of common?*—403, 404.

It is a right which one man has in the lands of another, the object of which is to pasture his cattle, or provide necessary fuel for his family, or for repairing his necessary implements of husbandry. Common of pasture is known as common of pasture *appendant*, and common of pasture *appurtenant*. Common *appendant* is founded on prescription, and is regularly annexed to arable land. It authorized the owner or occupier of the arable land to put commonable beasts upon the waste grounds of the manor. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription. It allowed the owner to put in other beasts than such as plow or manure the land. Common of *estovers* may be equally dependant or appurtenant.

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9. *What is a general rule as to right of common?*—408.

A right of common shall not be so changed or modified, by the act of the parties, as to increase, or even create the temptation to increase, the charge upon the land out of which common is to be taken. An extinguishment of the right as to a portion of the land charged, is an extinguishment of the whole.

10. *What is a right of piscary?*—409–412, *n.* (*a.*)

It is said to be a liberty or right of fishery in the water covering the soil of another person, or in a river running through another man's land. In the leading case* on the question of fisheries, the doctrine laid down was, that a subject might have a several freehold interest in a navigable river or tide-water, by special grant from the crown, but not otherwise; and that without such grant, or prescription which is evidence of a grant, the right of fishing was common. On the other hand, it was held that in rivers not navigable (and, in the common-law sense of the term, those only were deemed navigable in which the tide ebbed and flowed) the owners of the soil, on each side, had the interest and the right of fishing; and it was an exclusive right, and extended to the center of the stream opposite their respective lands.

The regulation of fisheries, within the jurisdiction of the several States, is now, generally, provided for by statute.

11. *To what is the right of fishing in streams, not navigable, held subject?*—418.

It is held subject to the public use of the water as a highway, and to the free passage of the fish, and in subordination to the regulations to be prescribed by the Legislature for the general good.

12. *What is the remedy for the disturbance of these incorporeal rights?*—419.

An action of ejectment, or a special action on the case, according to the nature of the right and injury.

* See Davies' Rep., 149.

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13. *What is a right of way?*—419, 420.

It is a right of private passage over another man's ground, and may arise either by grant or prescription. If it be a right of way in gross, or a mere personal right, it can not be assigned, nor descend. But if it be appended or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant. It may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his land. This principle was carried so far as to be applied to a trustee selling land he held in trust, and to which there was no access but over the trustee's own land.

14. *What is the rule if a highway be impassable?*—424.

There is a temporary right of way over the adjoining land; but this right applies to public and not to private ways.

15. *What is the law as to riparian rights?*—427.

It is a settled principle of the English law, that the right of the soil of owners of land bounded by the sea, or on navigable rivers where the tide ebbs and flows, extends to high-water mark; and the shore, below the common high-water mark, belongs to the State as trustee for the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property. The shores of navigable waters, and the soil under them, belong to the State, in which they are situated, as sovereign. But grants of land, bounded on rivers, or upon the margins of the same, above tide water, carry the exclusive right and title of the grantee to the center of the stream; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, as a public highway.

16. *What is the general doctrine as to alluvions?*—428.

If a fresh water river insensibly gains on one side or the other, the title of the owner, at each side, continues to go *ad filum medium aquæ*, but if the alteration be sensibly and sud-

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denly made, the ownership remains according to the former bounds; and if the river should then forsake its channel, and make an entirely new one in the lands of the owner on one side, he will become owner of the whole river, so far as it is inclosed by his land.

17. *Has the common law, with regard to riparian rights, been rejected or deemed inapplicable in some of the States?*—429–431.

Yes; in Maine, Massachusetts, Pennsylvania, and North and South Carolina, it has undergone some modifications.

18. *What is the law in respect to public highways?*—432.

It is the same as that of fresh water rivers, and the analogy is perfect as respects the right of soil. The presumption is, that the owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil, they have a right to all ordinary remedies for the freehold.

19. *What are servitudes?*—434.

Easements, or real rights existing in the property of another. Like incorporeal hereditaments, they have been held not to pass without grant. By virtue of such a right, the proprietor of the estates charged is bound to permit, or not to do, certain acts in relation to his estate, for the utility or accommodation of a third person, or of the possession of an adjoining estate.

20. *What is the general rule as to party walls?*—437.

If the owner of one house pulls it down in order to build a new one, and at the same time pulls down the party wall, he is bound to pull down and reinstate the wall in a reasonable time and with the least inconvenience; and if the old wall require repairing, the neighbor is bound to contribute ratably, but he is not bound to contribute toward building the new wall higher than the old one, or with more costly materials.

21. *What is the rule in respect to running waters?*—439.

That no proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment.

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He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*, is the language of the law.

22. *May a right to easements be acquired by prescription?*—442.

Yes; the general and established doctrine is, that an exclusive enjoyment of water, light or any other easement, in any particular way, for twenty years, or for such period less than twenty years as in any particular State is the established period of limitation, and enjoyed continuously and without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title, as against a right in any other person, which might have been but was not asserted.

23. *Has the common law in regard to "ancient lights" been adopted with us?*—448, *n.*

The Supreme Court of New York has rejected it as being inapplicable to this country, and in Connecticut and Massachusetts it has been declared, by statute, that a right to light can not be acquired by prescription. But in Illinois, an action will lie for obstructing the air and light of a house, and lights are deemed ancient after an enjoyment of them for twenty years.

24. *May easements be lost by non-user?*—448–450.

A right acquired by use may be lost by non-user, and an absolute discontinuance of the use affords a presumption of the extinguishment of the right in favor of some other adverse right. As an enjoyment for twenty years is necessary to found presumption of a grant, the general rule is, that there must be similar non-user to raise the presumption of a release; but the discontinuance should be absolute and decisive, and unaccompanied with any intention to resume it within a reasonable time.

25. *What is the distinction between an easement and a license?*—452.

A claim for an easement must be founded upon grant by deed or writing, or upon prescription which supposes one; for it is a permanent interest in another's land, with a right at all times to enter and enjoy it. But a license is an authority to do a particular act, or series of acts, upon another's land, without

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possessing any estate therein. It is founded on personal confidence, and is not assignable.

26. *What of offices?*—454.

Offices, in England, may be granted to a man in fee, or for life, as well as for years, and at will. In the United States no public office can properly be termed an hereditament, or a thing capable of being inherited.

27. *What are franchises?*—458.

They are certain privileges conferred by grant from government, and vested in individuals, such as the privilege of making a road, or establishing a ferry, and taking tolls for the use of the same. In England they are understood to be royal privileges in the hands of a subject.

28. *What are annuities?*—460.

An annuity, says Lord Coke, is a yearly sum stipulated to be paid to another, in fee, or for life, or for years, and chargeable only on the person of the grantor. If it be agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent, like a personal fee. It is chargeable upon the person of the grantor, for if the annuity was made chargeable upon land, it would be a rent-charge.

29. *What are rents?*—460.

Rent is a certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements, in return for the use, and it can not issue out of a mere privilege or easement. There were, at common law, according to Littleton, three kinds of rents, viz.: rent-service, rent-charge, and rent-seck.

30. *What was rent-service?*—461.

Where the tenant held his land by fealty, or other corporeal service, and a certain rent. A right of distress was inseparably incident to this rent.

31. *What is a rent-charge, or fee-farm rent?*—461.

Where the rent is created by deed, and the fee granted;

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and as there is no fealty annexed to such a grant of the whole estate, rent charge was not favored at common law. The right of distress is not an incident, and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent-charge.

32. *What was rent-seck,* siccus, *or barren rent?*—461.

It was rent reserved by deed without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land.

33. *What is the rule as to whom rent must be reserved?*—463.

That it must be reserved to him from whom the land proceeded, or his lawful representatives, and it can not be reserved to a stranger.

34. *What will discharge the tenant from paying the rent?*—464.

If the tenant be evicted by title paramount before the rent falls due, he will be discharged from the payment. But if the lawful eviction by paramount title be of part only of the demised premises, the rent is apportionable, and the eviction a bar *pro tanto.* So, if there be an actual expulsion of the tenant from the whole, or part, by the lessor before the rent becomes due, the entire rent is suspended.

35. *What is the rule in cases where the premises are destroyed, as by fire?*—466.

That upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from paying the rent.

36. *Where and when is rent to be paid?*—468.

When rent is due, a tender upon the land is good, and prevents forfeiture, when the contract is silent as to the place of payment; and a personal tender to the landlord, off the land, is also good.

In the absence of any special agreement, rent would be payable yearly, half yearly or quarterly, according to usage and the presumed intention to conform to it; if no usage, the rent is

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due at the end of the year. In the city of New York, it is provided by statute, that, in the absence of special agreement, rent is payable quarterly, and the hiring terminates on the first of May thereafter.

37. *May rent be apportioned?*—469.

Yes: either by granting the reversion of part of the land out of which the rent issues, or by granting part of the rent to one person and part to another.

38. *What is the remedy for the non-payment of rent?*—471, 472.

An action of covenant, or debt, or assumpsit for use and occupation, according to the nature of the instrument or contract by which payment is secured. Or the landlord may reenter, or recover possession by ejectment, or he may distrain the goods and chattels found upon the land in those States in which the right of distress has not been abolished.

39. *In what cases are articles not distrainable at common law?*—477, et seq.

Articles temporarily placed upon land, by way of trade, and belonging to third persons. A horse at a public inn, or sent to a livery stable to be taken care of, or corn at a mill, or cloth at a tailor shop, or grazier's cattle put upon the land for the night, on the way to market, or goods deposited in a warehouse for sale or on storage, in the way of trade, or goods of a principal in the hands of a factor are not distrainable for rent. Nor can beasts of the plow, sheep, or implements of a man's trade be taken for rent, so long as other property can be found.

Various other articles are exempted in some of the States by special statutes from distress, and in New York and other States the right of distress has been altogether abolished.

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LECTURE LIII.

OF THE HISTORY OF FEUDAL TENURE.

1. *To what source do we trace the origin of the feudal system?*—491, et seq.

To the Gothic or northern nations. Some authors have supposed that the sources of feuds were not confined to those nations. And Niebuhr, in his History of Rome, volume I., 99, declares the relation of patron and client to have been the feudal system in its noblest form. The better and prevailing opinion, however, is, that the origin of the feudal system is essentially to be attributed to the northern Gothic conquerors of the Roman empire. It was part of their military policy, and devised by them as the most effectual means to secure their conquests. The chieftain, as head or representative of his nation, allotted portions of the conquered lands, in parcels, to his principal followers, and they, in their turn, gave smaller parcels to their subtenants or vassals, and all were granted on the same conditions of fealty and military service. The rudiments of the feudal law have been supposed, by many modern feudists, to have existed in the usages of the ancient Germans, as they were studied and described by Cæsar and Tacitus. The traces of the feudal policy were first distinctly perceived among the Franks, Burgundians and Lombards, after they had invaded the Roman provinces. They generally permitted the Roman institutions to remain in the cities and towns, but they claimed a proportion of the land and slaves of the provincials, and brought their own laws and usages with them. The conquered lands, which were appropriated by military chiefs to their faithful followers, had the condition of future military service annexed, and this was the origin of *fiefs* and *feudal* tenures. The same class of persons, who had been characterized as volunteers or companions in Germany, became loyal vassals under the feudal grants. These grants, which were at first called benefices, were, in their origin, for life, or perhaps only for a term of years. The vassal had a right to use the land, and take the profits, and was bound to render in return such feudal duties and services as belonged to military

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tenure. The property of the soil remained in the lord from whom the grant was received. The king or lord had the *dominium rectum*, and the vassal or feudatory the *dominium utile*. Prior to the introduction of the feudal system, lands were allodial, and held in free and absolute ownership in like manner as personal property was held. Allodial land was not suddenly but very gradually supplanted by the law of tenures. They were never so entirely introduced as to abolish all vestiges of allodial estates. The precise time when benefices became hereditary is uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates. The perpetuity of fiefs was established earlier in France than in Germany; but throughout the continent it appears they had become hereditary, and accompanied with the right of primogeniture and all the other incidents peculiar to feudal governments, long before the era of the Norman conquest.

England was distinguished above every part of Europe for the universal establishment of feudal tenures. There is no presumption or admission in the English law of allodial lands. They are all held by some feudal tenure. There were traces of feudal grants, and of the relation of lord and vassal in the time of the Anglo-Saxons, but the formal and regular establishment of feudal tenures in their genuine character, and with all their fruits and services, was in the reign of William the Conqueror. The tenures which were authoritatively established in England in the time of the Conqueror were principally of two kinds, according to the services annexed. They were either tenures by *knight service*, in which the services, though occasionally uncertain, were altogether of a military nature; or tenures by *socage*, in which the services were defined and certain, and generally of a predial or pacific nature.

Most of the feudal incidents and consequences of socage tenure were expressly abolished in New York by the act of 1787; and they were wholly and entirely annihilated by the New York Revised Statutes They were also abolished by statute in Connecticut in 1793; and they have never existed, or they have ceased to exist in all essential respects, in every other State. The only feudal fictions and services which can be presumed to exist in the United States, consist of the feudal prin-

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ciple, that the lands are held of some superior or lord, to whom the obligations of fealty, and to pay a determinate rent, are due. But this doctrine of feudal fealty has never been practically applied, or assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the State, and then it resolved itself into the oath of allegiance which every citizen, on a proper occasion, may be required to take.

LECTURE LIV.

OF ESTATES IN FEE.

The perusal of the former volumes has prepared the student to enter upon the doctrine of real estates, which is by far the most artificial and complex branch of our municipal law.

In treating of the doctrine of real estates, it will be most convenient, as well as most intelligible, to employ the established technical language to which we are accustomed, and which appertains to the science. Though the law in some of the United States discriminates between an estate in pure *allodium*, and an estate in fee simple absolute, these estates mean essentially the same thing; and the terms may be used indiscriminately to describe the most ample and perfect interest which can be owned in land.—2.

1. *Have not the words* seisin *and* fee *been always used in New York?*—2, 3.

They have, whether the subject was lands granted before or since the Revolution; though by the act of 1787, the former were declared to be held by the tenure of free and common socage, and the latter in free and pure allodium, but this was an unnecessary distinction in legal phraseology as applied to estates; and the distinction lay dormant in the statute, and was utterly lost and unfounded in practice. The technical language of the common law is too deeply rooted in our usages and institutions, to be materially affected by legislative enactments.

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In Connecticut and Virginia, the terms seisin and fee are also applied to all estates of inheritance, though the lands in those States are declared to be allodial and free from every vestige of feudal tenure.

2. *What have the New York Revised Statutes declared on this subject?*—3.

That all lands within the State are allodial, and the entire and absolute property vested in the owners, according to their respective estates. All feudal tenures of every description, with their incidents, are abolished, subject, nevertheless, to the liability to escheat, and to any rents or services certain, which had been, or might be, created or reserved; and to avoid the inconvenience and absurdity of attempting a change in the technical language of the law, it was further declared, that every estate of inheritance, notwithstanding the abolition of tenure, should continue to be called a fee simple, or fee; and that every such estate, when not defeasible or conditional, should be termed a fee simple absolute, or an absolute fee.

3. *What is the proper meaning of a "fee," as now used in this country?*—3, 4.

An estate of inheritance in law, belonging to the owner, and transmissible to his heirs. No estate is deemed a fee, unless it may continue for ever.

4. *What is an estate called, whose duration is circumscribed by one or more lives in being?*—4.

A freehold. Though the limitation be to a man and his heirs, during the life or widowhood of B, it is not an inheritance or fee, because the event must necessarily take place within the period of a life. It is merely a freehold with a descendible or transmissible quality; and the heir takes the land as a descendible freehold.

5. *What is the most simple division of estates as laid down in the books?*—4.

That mentioned by Sir William Blackstone, into inheritances absolute or fee *simple*, and inheritances *limited;* and

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these limited fees he subdivides into *qualified* and *conditional* fees. This was according to Lord Coke's division.

6. *How has Mr. Preston, in his treatise on estates, divided fees?*—4.

Into fees simple, fees determinable, fees qualified, fees conditional, and fees tail.

7. *What is a fee simple at common law?*—5.

It is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally, under the restriction that they must be of the blood of the first purchaser, and of the blood of the person last seized. It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater interest in land.

8. *Is, or is not the word, heirs, at common law, necessary to be used, if the estate is to be created by deed?*—5, 6.

It is.

9. *If a man purchase lands to himself for ever, or to him and his assigns for ever, what will he take at common law?*—5, 6.

He takes but an estate for life; though the intent of the parties be ever so clearly expressed in the deed, a fee can not pass without the word heirs. The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, *stricti juris*, made in consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs.

10. *Has not the rule for a long time been controlled by a more liberal policy?*—6.

It has, and it is counteracted in practice by other rules equally artificial in their nature, and technical in their application.

11. *Does it apply to conveyances by fine?*—6.

It does not, where the fine is in the nature of an action.

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12. *Does the rule apply to a common recovery?*—7.

It does not.

13. *Does it apply to a release by way of extinguishment, as of a common of pasture?*—7.

It does not; nor to a partition between joint-tenants, coparceners, and tenants in common; nor to releases of right to land by way of discharge or passing the right, by one joint-tenant or coparcener to another.

14. *What does the releasee take, in taking a distinct interest in his separate part of the land?*—7.

He takes the like estate in quantity, which he had before in common.

15. *How do grants to corporations aggregate pass the fee?*—7.

Grants to corporations pass the fee without the words heirs or successors, because in judgment of law a corporation never dies, and is immortal by means of perpetual succession.

16. *Will a fee pass by will without the word heirs?*—7.

It will, if the intention to pass a fee can be clearly ascertained from the will, or a fee be necessary to sustain the charge or trust created by the will. It is likewise understood, that a Court of Equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee.

17. *But has not the statute law of some of the States abolished the inflexible rule of the common law?*—7, 8.

It has. In Virginia, Kentucky, Mississippi, Missouri, Alabama, New York, and doubtless, other States, the word heirs, or other words of inheritance, are no longer requisite to create or convey an estate in fee; and every grant or devise of real estate, made subsequently to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms or by necessary implication. The statute of New York also adds, for greater caution, a declara-

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tory provision, that in the construction of every instrument creating or conveying any estate or interest in land, it shall be the duty of the courts to carry into effect the intention of the parties, so far as such intention can be collected from the whole instrument, and is consistent with the rules of law.

18. *What is a qualified, base, or determinable fee?*—9.

It is an interest which may continue for ever, but the estate is liable to be determined by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be perishable or transitory, yet such estates are deemed fees, because, it is said, they have a possibility of enduring for ever. A limitation to a man and his heirs, so long as A shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations or when the qualification annexed to it is at an end.

19. *What if the event, marked out as the boundary to the time of the continuance of the estate, becomes impossible?*—9.

The estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time the estate is in the grantee, subject only to a possibility of reverter in the grantor.

20. *What renders the estate a fee, and not merely a freehold?*—9.

The uncertainty of the event, and the possibility that the fee may last for ever.

21. *What are determinable fees, and how long do they continue descendible inheritances?*—9.

All fees liable to be defeated by an executory devise are determinable fees, and they continue descendible inheritances until they are discharged from the terminable quality annexed to them, either by the happening of the event, or by a release.

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22. *What are these qualified and determinable fees termed?*—9.

They are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the title.

23. *May a tenant in tail, by a bargain and sale, lease and release, or covenant to stand seized, create a base fee, which will not determine until the issue in tail enters?*—9.

Yes, he may.

24. *If the owner of a determinable fee conveys in fee, what follows the transfer, and on what is such a result founded?*—10.

The determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that *nemo potest plus juris in alium transfere quam ipse habet.*

25. *What rights and privileges over the estate has the proprietor of a qualified fee?*—10.

The same as if he were a tenant in fee simple, subject to that common law maxim.

26. *What is a conditional fee?*—11.

It is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.

27. *How was this fee construed at common law?*—11.

It was construed to be a fee simple, on condition that the grantee had the heirs prescribed.

28. *What if the grantee died without issue?*—11.

Then the lands reverted to the grantor.

29. *What if he had the specified issue?*—11.

The condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land, and bar not only his own issue, but the possibility of a reverter.

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30. *Could the tenant of the fee simple conditional have, by feoffment, bound the issue of his body before issue had?*—11.

He could.

31. *After issue born, could the tenant bar the donor and his heirs of their possibility of a reversion?*—11.

Yes, but the course of descent was not altered thereby.

32. *How was it before the statute* de donis?—11.

Before the enactment of the statute so called, a fee on condition that the donee had issue of his body, was in fact a fee tail, and the limitation was not effaced by the birth of issue.

33. *What effect had the statute* de donis, *on the birth of issue, and how was it considered by the courts of justice?*—12.

It took away the power of alienation on the birth of issue, and the courts of justice considered that the estate was divided into a particular estate in the donee, and a reversion in the donor.

34. *When the donee had a fee simple before, what had he by the statute?*—12.

An estate tail.

35. *Under this division of the estate, could the donee bar or charge his issue?*—12.

He could not. But the tenant in tail was not chargeable with waste, and the widow had her dower and the husband his curtesy in the estate tail.

36. *Were estates tail liable to forfeiture, for treason or felony?*—13.

No. Nor were they chargeable with the debts of the ancestor, nor bound by alienation.

37. *To whom were they beneficial, and to whom injurious?*—13.

They were conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation.

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38. *When was relief first obtained against this great national grievance?*—13.

It was not until Taltarum's case, 12 Edward IV., that relief was obtained, and it was given by a bold and unexampled stretch of the power of judicial legislation.

39. *What, then, did the judges resolve upon?*—13.

Upon consultation they resolved that an estate tail might be cut off and barred by a common recovery, and that, by reason of the intended recompense, the common recovery was not within the restraint of the statute *de donis*.

40. *Were these recoveries afterward taken notice of?*—13

They were, and indirectly sanctioned by several acts of Parliament, and have, ever since their application to estates tail, been held as one of the lawful and established assurances of the realm.

41. *How are they now considered?*—13.

They are now considered merely in the light of a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were a tenant in fee simple; and estates tail in England, for a long time past, have been reduced to almost the same state, even before issue born, as conditional fees were at common law, after the condition was performed by the birth of issue.

42. *What does a common recovery remove?*—13, 14.

It removes all limitations upon an estate tail, and an absolute, unfettered, pure fee simple passes as the legal effect and operation of a common recovery.

43. *What does a tenant in tail bar by fine?*—14.

His issue only, and not subsequent remainders.

44. *What alone is it, that passes an absolute title?*—14.

The common recovery.

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45. *Did not estates tail subsist in full force before our Revolution?*—14.

They did.

46. *Has not the doctrine of estates tail, and the complex and multifarious learning connected with it, become quite obsolete in most parts of the United States?*—14, 15.

Yes, it has. In Virginia, estates tail were abolished as early as 1776; in New Jersey, estates tail were not abolished till 1820; and in New York, as early as 1782, all estates tail were turned into estates in fee simple absolute. So, in North Carolina, Kentucky, Tennessee, Georgia, Missouri, and other States, estates tail have been abolished, by being converted by statute into estates in fee simple. In the States of South Carolina and Louisiana, they do not appear to be known to their laws, or even to have existed; but in several of the other States, they are partially tolerated, and exist in a qualified degree.

47. *What of conditional fees at common law?*—16.

They have generally partaken of the fate of estates in fee tail, and have not been revived in this country.

48. *Does the general policy of this country encourage restraints upon the power of alienation of land?*—17.

No. It does not.

49. *Have the New York Revised Statutes enlarged or abridged the prevailing extent of executory limitations?*—17.

They have considerably abridged them.

50. *Have not entails, under certain modifications, been retained in various parts of the United States?*—19, 20.

They have, with increased power over the property, and greater facility of alienation. The desire to preserve and perpetuate family influence and property is very prevalent with mankind, and is deeply seated in the affections.

This propensity is attended with many beneficial effects. But if the doctrine of entails be calculated to stimulate exertion and economy, by the hope of placing the fruits of talent and in-

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dustry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has a tendency on the other hand to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and vicious.

Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvement. The practice of perpetual entails is carried to a great extent in Scotland, and that eminent philosopher observed, half a century ago, that one third of the whole land of the country was loaded with the fetters of a strict entail; and it is understood that additions are every day making to the quantity of land in tail, and that they now extend over half the country. Some of the most distinguished of the Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very powerful incentive to persevering industry and honest ambition.

51. *What says Mr. Gibbon on the simplicity of the civil law?*—20.

It is said by him to have been a stranger to the long and intricate system of entails; and yet the Roman trust settlements, or *fidei commissa*, were analogous to estates tail. When an estate was left to an heir in trust, to leave it at his death to his eldest son, and so on by way of substitution, the person substituted corresponded in a degree to the English issue in tail.

52. *How far were entails formerly permitted to extend in France?*—21, 22.

To the period of three lives only; but in process of time they gained ground, and trust settlements, says the ordinance of 1747, were extended not only to many persons successively, but to a long series of generations. That new kind of succession or entailment was founded on private will, which had usurped the place of law, and established a new kind of jurisprudence. It led to numerous and subtle questions, which perplexed the tribunals, and the circulation of property was embarrassed. Chancellor D'Aguesseau prepared the ordinance of 1747, which was drawn with great wisdom, after consultation with the principal magistrates of the provincial parliaments, and the superior councils of the realm, and receiving the exact reports of the state of the

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local jurisprudence on the subject. It limited the entail to two degrees, counted *per capita*, between the maker of the entail and the heir; and, therefore, if the testator made A his devisee for life, and after the death of A to B, and after his death to C, and after his death to D, etc., and the estate should descend from A to B, and from B to C, he would hold it absolutely, and the remainder over to D would be void. But the Code Napoleon annihilated the mitigated entailments allowed by the ordinance of 1747, and declared all substitutions or entails to be null and void, even in respect to the first donee.

LECTURE LV.

OF ESTATES FOR LIFE.

1. *What is an estate of freehold?*—23, 24.

An estate of freehold is a denomination which applies equally to an estate of inheritance and an estate for life. Sir William Blackstone confines the description of a freehold estate simply to the incident of livery of seisin, which applies to estates of inheritance and estates for life; and as those estates were the only ones which could not be conveyed at common law without the solemnity of livery of seisin, no other estates were properly freehold estates. Any estate of inheritance, or for life, in real property, whether it be a corporeal or an incorporeal hereditament, may justly be denominated a freehold.

2. *What, by the ancient law, did a freehold interest confer upon the owner?*—24.

A variety of valuable rights and privileges. He became a suitor of the courts, and a judge in the capacity of a juror; he was entitled to vote for members of Parliament, and to defend his title to the land; as owner of the immediate freehold, he was a necessary tenant to the *præcipe* in a real action, and he had a right to call in the aid of the reversioner or remainder-man,

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when the inheritance was demanded. These rights gave him importance and dignity as a freeholder and freeman.

3. *How were estates for life divided?*—24.

Into conventional and legal estates. The first are created by the act of parties, and the second by the operation of law.

4. *In what two ways may life estates be created?*—25.

1. By express words, as if A conveys land to B for the term of his natural life. 2. They may arise by construction of law, as if A conveys land to B without specifying the time of duration, and without words of limitation. In this last case, B can not have an estate in fee, according to the English law, and according to the law of those parts of the United States which have not altered the common law in this particular, but he will take the largest estate which can possibly arise from the grant, and that is an estate for life.

5. *Of what two kinds are life estates?*—25, 26.

Either for a man's own life, or for the life of another person, and in this last case, it is termed an estate *pour autre vie*, which is the lowest species of freehold, and esteemed of less value than an estate for one's own life.

6. *How has the law in this respect proceeded?*—26.

It has proceeded upon the known principles of human nature, for, in the ordinary opinion of mankind, as well as in the language of Lord Coke, "an estate for a man's own life is higher than for another man's life."

7. *What third branch of life estate may also be added?*—26.

An estate for the term of the tenant's own life, and the life of one or more third persons. In this case, the tenant for life has but one freehold limited to own his life and the life of the other party or parties.

8. *May not these estates be made to depend upon a contingency, which can happen and determine the estate before the death of the grantee?*—26.

Yes. Thus if an estate be given to a woman *dum sola*, or

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durante viduitate, or to a person so long as he shall dwell in a particular place, or for any other indeterminate period, as a grant of an estate to a man until he shall have received a given sum out of the rents and profits; in all these cases the grantee takes an estate for life, but one that is determinable upon the happening of the event on which the contingency depended. If the tenant for the life of B died in the lifetime of B, the estate was open to any general occupant during the life of B; but if the grant was to A and his heirs during the life of B, the heir took it as a special occupant.

9. *How, in New York, is an estate* pour autre vie *deemed, whether limited to heirs or otherwise?*—27.

It is deemed a freehold only during the life of the grantee or devisee, and after his death it is deemed a chattel real.

10. *What is tenancy by the curtesy?*—27, 28.

It is an estate for life, created by the act of the law. When a man marries a woman, seized, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue born alive, during the life of the mother, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin.

11. *How, in South Carolina, is tenancy by curtesy*, eo nomine? —29.

It has ceased by the provision of an act in 1794, *relative to the distribution of intestates' estates*, which gives to the husband surviving his wife the same share of her real estate as she would have taken out of his, if left a widow, and that is either one moiety or one third of it, in fee, according to circumstances

12. *How in Georgia?*—29.

In Georgia it does not exist; because all marriages since 1785 vest the real equally with the personal estate of the wife in the husband.

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13. *What four things are requisite to an estate by the curtesy?*—29.

1. Marriage.
2. Actual seisin of the wife.
3. Issue.
4. Death of the wife.

14. *Does the law vest the estate in the husband on the death of the wife, without entry?*—29.

It does.

15. *When is his estate initiate and when consummate?*—29, *n.* (*a.*)

His estate is initiate on issue had, and consummate on the death of the wife. In Pennsylvania, the husband's curtesy is good by statute passed in 1833, though there be no issue of the marriage.

16. *How must the wife, according to the English law, have been seised to entitle the husband to his curtesy?*—29.

In fact and in deed, and not merely of a seisin in law, of an estate of inheritance.

17. *What is the law of curtesy in Connecticut?*—30.

The law of curtesy in that State is made to symmetrize with other parts of their system, and ownership without seisin is sufficient to govern the descent or devise of real estate.

18. *Has the severity of the ancient law on the right to curtesy been relaxed?*—30, *n.* (*b.*)

Yes; a constructive seisin of the wife is sufficient to sustain the husband's right to his curtesy, where it is not rebutted by an actual disseisin.

19. *Could the husband at common law be tenant by the curtesy of a use; and how is that point now settled in equity?*—30.

He could not; but it is now settled in equity that he may be tenant by the curtesy of an equity of redemption, and of lands of which the wife had only a seisin in equity as a *cestui que trust.*

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20. *Is the receipt of the rents and profits a sufficient seisin in the wife?*—31.

It is.

21. *What if the lands be devised to the wife for her separate and exclusive use, and with a clear and distinct expression that the husband was not to have any life estate or other interest, but the same was to be for the wife and her heirs?*—31.

In that case the Court of Chancery will consider the husband a trustee for the wife and her heirs, and bar him of his curtesy.

22. *Is the husband of a mortgagee in fee entitled to his curtesy?*—32.

No.

23. *What has this rule now become?*—32.

It has now become common learning, and it is well understood that the rights existing in, or flowing from the mortgagee, are subject to the claims of the equity of redemption, so long as the same remains in force.

24. *To what estates does curtesy apply?*—32.

To qualified as well as to absolute estates in fee.

25. *Does the husband forfeit his curtesy by adultery?*—34.

No.

26. *What is dower, and when and where does it exist?*—35.

It is a species of life estate created by the act of the law, and it exists where a man is seised of an estate of inheritance, and dies in the lifetime of his wife.

27. *Of what, in such a case, is she at common law entitled to be endowed?*—35, *n.* (*d.*)

Of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir, and these she held for the term of her

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natural life. The statute law of New Jersey, Virginia, New York, Missouri and Arkansas omits the condition in respect to the wife's issue.

28. *For what was this humane condition of the common law intended?*—35.

For the sure and competent sustenance of the widow, and the better nurture and education of her children.

29. *What three things are requisite to the consummation of the title to dower?*—36.

1. Marriage. 2. Seisin of the husband. 3. His death.

30. *Upon what marriage does dower attach?*—36.

It attaches upon all marriages not absolutely void, and existing at the death of the husband; it belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*.

31. *Are alien widows entitled to dower?*—36, 37.

Not at common law; but the rule has been relaxed in some of the States.

32. *What must the husband have had, and at what time, to entitle the wife to dower?*—37.

The husband must have had seisin of the land in severalty, and at some time during the marriage.

33. *Does a title to dower attach on a joint seisin?*—37.

No.

34. *Will a mere possibility of the estate being defeated by survivorship prevent dower?*—37.

It will.

35. *How far did the old rule go on this subject?*—37.

It went so far as to declare, that if one joint-tenant aliens his share, his wife shall not be endowed, notwithstanding the

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possibility of the other joint-tenant taking by survivorship is destroyed by the severance; for the husband was never sole seised.

36. *Is it sufficient to give a title to dower, that the husband had a seisin in law, without being actually seised?*—37.

It is.

37. *What reason is given for the distinction on this point between dower and curtesy?*—37.

The reason is, that it is not in the wife's power to procure an actual seisin by the husband's entry, whereas the husband has always the power of procuring seisin of the wife's land.

38. *If land descends to the husband as heir, and he dies before entry, will his wife be entitled to her dower?*—37, 38.

She will, and this would be the case, even if a stranger should, in the intermediate time, by way of abatement, enter upon the land; for the law contemplates a space of time between the death of the ancestor, and the entry of the abator, during which time the husband had a seisin in law as heir.

39. *But is it not necessary that the husband should have been seised either in fact or in law, to entitle to dower?*—38.

It is; and where the husband had been in possession for years, using the land as his own, and conveying it in fee, the tenant deriving title under him is concluded from controverting the seisin of the husband, in the action of dower. If, however, upon the determination of a particular freehold estate, the tenant holds over and continues his seisin, and the husband dies before entry, or if he dies before entry in a case of forfeiture for a condition broken, his wife is not dowable, because he had no seisin either in fact or in law.

40. *Will the laches of the husband prejudice the claim of dower, when he has no seisin in law?*—38.

When he has no seisin in law they will, but not otherwise. So, if a lease for life be made before marriage, by a person seised in fee, the wife of the lessor will be excluded from her dower, unless the life estate terminates during coverture, because the

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husband, though entitled to the reversion in fee, was not seised of the *immediate* freehold. If the lease was made subsequent to the time that the title to dower attached, the wife is dowable of the land, and defeats the lease by title paramount.

41. *Will a transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of a conusee of a fine, be sufficient to give the wife dower?*—38, 39.

It will not. The same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase money in whole or in part. Dower can not be claimed as against rights under that mortgage. The husband is not deemed sufficiently or beneficially seised by such an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgagee, and this conclusion is agreeable to the manifest justice of the case. The widow, in this case, on foreclosure of the mortgage and sale of the mortgaged premises, will be entitled to her claim to the extent of her dower in the surplus proceeds, after satisfying the mortgage; and if the heir redeems, or she brings her writ of dower, she is let in for her dower, on contributing her proportion of the mortgage debt.

42. *How must the husband be seised, to create a title to dower?*—39.

He must be seised, *simul et semel*, of a freehold in possession, and of an estate of immediate inheritance in remainder or reversion. No freehold estate in a third person must intervene between the freehold and the inheritance of the husband; the intervention of a term of years will not prevent dower from attaching.

43. *Does dower attach to all real hereditaments?*—40–42.

It does at common law, but in several of the States it has been reduced down to the lands whereof the husband died seised, and in Maine, New Hampshire, and Massachusetts, the widow is not dowable of land in a wild state, unconnected with any cultivated farm.

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44. *What is the reason of the American rule, giving dower in equities of redemption?*—45, 46.

The reason is, that the mortgagor, so long as the mortgagee does not exert his right of entry or foreclosure, is regarded as being legally as well as equitably seised in respect to all the world but the mortgagee and his assigns. But if she claims dower in an equity of redemption, she is bound to contribute towards the redemption of the mortgage.

45. *Is the widow of a mortgagee who dies before foreclosure or entry, though after the technical forfeiture of the mortgage by non-payment on the day it came due, entitled to dower?*—47.

The better opinion is, that she is not, and in New York it is specially provided by statute that she shall not have dower in the mortgaged lands unless the husband acquired an absolute estate therein during marriage.

46. *Will dower be defeated upon the restoration of the seisin under the prior title in the case of defeasible estates, as in the case of reëntry for a condition broken, which abolishes the intermediate seisin?*—48.

It will.

47. *Will a recovery by actual title against the husband, also defeat the wife's dower?*—48.

Yes.

48. *But what if he gives up the land by default and collusively?*—48, *n.* (*b.*)

The statute of Westminster 2, chapter 4, preserved the wife's dower, unless the tenant could show affirmatively a good seisin out of the husband and in himself. This statute has been adopted and enlarged by the New York Revised Statutes.

49. *By what is the wife's dower liable to be defeated, on a general principle?*—50.

By every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin.

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50. *If the husband and wife levy a fine, or suffer a common recovery, is the wife barred of her dower?*—51

She is.

51. *Does a divorce,* a vinculo matrimonii, *bar the claim of dower?*—54.

It does. But in case of divorce for adultery of the husband, it is provided in those States which authorize the divorce, that dower shall be preserved or a reasonable provision made in lieu thereof.

52. *May the wife be barred of her dower, by having a joint estate, usually denominated a* jointure, *settled upon her and her husband, and in case of his death to be extended to the use of the wife during her life?*—54.

She may.

53. *What four provisions must be complied with, in a jointure, to bar a dower?*—54.

1. It must take effect immediately on the death of the husband. 2. It must be for the wife's life. 3. It must be made and declared to be in satisfaction of her whole dower. 4. It must be to the wife herself, and not to any other person in trust for her.

54. *Is a conveyance to trustees, for the use of the wife after the husband's death, in point of law a jointure?*—55, 56.

No; but such a settlement, if in other respects good, will be enforced in chancery as an equitable bar of dower; and courts of equity have greatly relieved the parties from the strict legal construction given to the statute concerning jointures. It has also been settled in England, after great discussion in the House of Lords, and in New York, that a jointure on an infant before coverture bars her dower, notwithstanding her infancy, on the ground of its being a provision by the husband for the wife's support. It was considered to be a bar, *a provisione viri* and not *ex contractu;* and the assent of the wife was held not to be an operative circumstance, though the ante-nuptial contract was, in the English case, executed by the infant in the presence of her guard-

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ian. An equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant before marriage, will also, in analogy to the statute, constitute an equitable bar. But the conveyance before marriage of an estate to the wife, to continue during widowhood, by way of jointure, or if made to depend on any other condition, will not bar her dower, even if she be an adult, unless, when a widow, she enters and accepts the qualified freehold. The legal or equitable provision must be a fair equivalent to the dower estate, to make it absolutely binding in the first instance. In New York, the statute of 27 Hen. VIII. concerning jointures, was, in 1787, adopted *verbatim;* but it has been altered and improved by the new Revised Statutes; and the principle in equity, allowing jointures to exist also by conveyance of lands to a trustee, in trust for the wife, has been introduced into the statute law, which provides, that if "an estate in lands be conveyed to a person and his intended wife, or to such intended wife alone, or to any other person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower, etc.; and the evidence of the assent of the wife shall be, by her becoming a party to the conveyance, if of age, and, if an infant, by her joining with her father or guardian therein."

The statute of 27 Hen. VIII. further provided, that if the settlement in jointure was made after marriage, the wife should have her election, if she survived her husband, to take it in lieu of dower, or to reject it, and betake herself to her dower at common law. So, if she was fairly evicted by law from her jointure, or any part of it, the deficiency was to be supplied from other lands, whereof she would have been otherwise dowable. Both these provisions formed a part of the statute of New York, in 1787, and they have probably been adopted in all the States where the law of jointure in bar of dower has been introduced.

55. *Is it not settled that a collateral satisfaction, consisting of money or other chattel interests, given by will, and accepted by the wife after her husband's death, will constitute an equitable bar of dower?*—57.

It is.

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56. *Have not the New York Revised Statutes embodied most of these principles of law and equity, with some variations and amendments?*—58.

They have.

57. *What do the New York Revised Statutes, together with the laws of Massachusetts and Connecticut, declare respecting dower?*—58.

They declare, that any pecuniary provision made before marriage in lieu of dower, if duly assented to by the wife, shall bar her dower.

58. *What was a principle of the common law, in case the husband seised of an estate of inheritance exchanged it for other lands?*—59.

The wife could not have dower of both estates, but should be put to her election.

59. *Is not this principle also introduced into the New York Revised Statutes?*—59.

Yes; and the widow is required to evince her election to take dower out of the lands given in exchange, by the commencement of proceedings to recover it, within one year after her husband's death, or else she shall be bound to take her dower out of the lands received in exchange.

60. *What is the usual way of barring dower in this country?*—59, 60.

It is usually done by the wife's joining her husband in a deed of conveyance of the land, containing apt words of grant or release on her part, and acknowledging the same privately, apart from her husband, in the mode prescribed by the statute laws of the several States. In New York and Illinois, if she resides out of the State, the simple execution of the deed by her will be sufficient to bar her dower, as to the lands within the State, equally as if she were a *feme sole*.

61. *What rights has the widow previous to assignment of dower?*—61.

She has the right to tarry in the chief house of her hus-

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band for forty days after the death of her husband, within which time her dower should be assigned her; and in the mean time she should have reasonable *estovers*, or maintenance, out of the estate.

62. *How may dower be assigned?*—63.

It may be made *in pais* by parol, by the party who hath the freehold; but if it be not assigned within forty days, the widow has her action at law by writ of dower, *unde nihil habet*, against the tenant of the freehold, and she may recover damages for non-assignment of her dower.

63. *May two or more widows be endowed out of the same messuage?*—64.

Yes. If A be seised and has a wife, and sells to B who has a wife, and the husbands then die leaving their wives surviving, the wife of B will be dowable of one third of two thirds in the first instance, and of one third of the remaining one third on the death of the widow of A, who, having the elder title in dower, is to be first satisfied of her dower out of the whole farm.

64. *What is the general rule in cases of alienation by the husband?*—65–68.

That the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent or increased value. The better opinion seems to be that the improved value, from which the widow is to be excluded, is that which has arisen from the actual labor and money of her husband's alienee, and not that which has arisen from extrinsic or general causes unconnected with the direct improvement of the alienee.

65. *As of what time is the widow seised when her estate is ascertained by assignment?*—69.

She is in, in the intendment of law, of the seisin of her husband, and not by the assignment.

66. *Is the right to dower barred by lapse of time?*—70.

Not at common law; but the statutes of New York and other States have limited the time for recovery of dower.

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67. *May dower be recovered by bill in equity, as well as by action at law?*—71, 72.

Yes. The jurisdiction of chancery over the claim of dower has been thoroughly examined, clearly asserted, and definitively established. It is a jurisdiction concurrent with that of law; and when the legal title to dower is in controversy, it must be settled at law; but if that be admitted or settled, full and effectual relief can be granted to the widow in equity, both as to the assignment of dower, and the damages. The equity jurisdiction was so well established, and in such exercise in England, that Lord Loughborough said that writs of dower had almost gone out of practice. The equity jurisdiction has been equally entertained in this country.

68. *How is the claim of dower considered in New Jersey?*—72.

It is considered as emphatically, if not exclusively, within the cognizance of the common law courts.

69. *What are the surrogates in New York, in addition to the legal remedies at law and in equity, empowered and directed to do, upon the application either of the widow, or of the heirs or owners?*—72.

To appoint three freeholders to set off by admeasurement the widow's dower. This convenient mode of assigning dower under the direction of the courts of probate, or upon petition to other competent jurisdictions in the several States, has probably in a great degree superseded the common law remedy by action.

70. *When a widow is legally seised of her freehold estate, as doweress, may she bequeath the crop in the ground of the land holden by her in dower?*—72.

She may

71. *To what is every tenant for life entitled of common right?*—73.

To take reasonable *estovers*, that is, wood from off the land, for fuel, fences, agricultural erections, and other necessary improvements.

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72. *Is he entitled, through his lawful representatives, to the profits of the growing crops, in case the estate determines by his death, before the produce can be gathered?*—73.

He is.

73. *What are these profits termed, and on what principles are they given?*—73.

They are termed emblements, and they are given on very obvious principles of justice and policy, as the time of the determination of the estate is uncertain.

74. *In what cases does this rule apply?*—73.

It extends to every case where the estate for life determines by the act of God, or by the act of the law, and not to cases where the estate is determined by the voluntary, willful, or wrongful act of the tenant himself.

75. *To what only is the doctrine of emblements applicable?*—73.

To the products of the earth which are annual, and raised by the yearly expense and labor of the tenant.

76. *Can tenants for life make under-leases for any lesser term?*—73, 74.

Yes; and the same rights and privileges are incidental to those under-tenants which belong to the original tenants for life.

77. *Are the tenants by the curtesy, and in dower, and for life or years, answerable for waste committed by a stranger?*—77.

They are; and they take their remedy over against him; and it is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste, by whomsoever the injury may have been committed, with the exception of the acts of God, and public enemies, and the acts of the reversioner himself.

78. *Is the tenant like a common carrier?*—77.

He is; and the law in this instance is founded on the same great principles of public policy. The landlord can not protect

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the property against strangers; and the tenant is on the spot, and presumed to be able to protect it.

79. *What were the ancient remedies for waste?*—77, 78.

The ancient remedies were writs of *estrepement*, and waste; but they are now essentially obsolete. And the modern practice is to resort to an injunction bill, when the injury would be irreparable, or to an action on the case in the nature of waste, to recover damages.

80. *Was not the provision in the statute of Gloucester giving, by way of penalty, the forfeiture of the place wasted, and treble damages, reënacted in New York and Virginia?*—80, 81.

It was; and it is the acknowledged rule of recovery, in some of the other States, in the action of waste. But the writ of waste is gone out of use, and a special action on the case, in the nature of waste, is the substitute.

LECTURE LVI.

OF ESTATES FOR YEARS, AT WILL, AND AT SUFFERANCE.

1. *What is a lease for years?*—85.

It is a contract for the possession and profits of land, for a determinate period, with the recompense of rent; and it is deemed an estate for years, though the number of years should exceed the ordinary limit of human life.

2. *Is an estate for life a higher and greater estate than an estate for years?*—85.

It is; notwithstanding the lease, according to Sir Edward Coke, should be for a thousand years or more; and if the lease be made for a less time than a single year, the lessee is still ranked among tenants for years.

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3. *Have we any instances of long leases in this country?*—93, 94, *n.*

Yes; some of terms of nearly one thousand years. But the revised Constitution of New York, of 1846, declared that no leases or grants of agricultural lands, to be thereafter made, for longer than twelve years, and reserving rent or service of any kind, should be valid. There is a similar provision in Wisconsin, the longest term there allowed being fifteen years, and in Alabama no leasehold estates can be created for more than twenty years. In Massachusetts, since 1836, lessees and assignees of lessees of real estate, for terms of one hundred years or more, of which at least fifty are unexpired, are regarded as freeholders, and the estate subject, like freehold estates, to descent, devise, dower and execution. In Ohio, since 1821, lands held under permanent leases are considered real estate in regard to judgments and executions. And in the purview of the Ohio statutes, leasehold estates, for the most essential purposes, as judgments, executions, descent and distribution, are regarded as freeholds or real estate.

4. *May leases for years be made to commence* in futuro?—9.

Yes; for, being chattel interests, they never were required to be created by feoffment and livery of seisin.

5. *How may leases for years be created?*—95.

The statute of frauds (which has been very generally adopted in this country) declared that all leases for years not put in writing should have the force of estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the time shall amount to two third parts of the full improved value of the thing demised. In New York, the statute declares that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created unless by deed in writing, signed by the party; and every contract for leasing longer than one year, or for the sale of lands or any interest therein, is declared void unless in writing and subscribed by the party.

6. *If land be let upon shares, for a single crop only, does that amount to a lease?*—95.

No; the possession remains in the owner.

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7. *May a lessee for years assign his interest?*—96.

Yes; he may assign or grant over his whole interest, unless restrained by covenant not to assign without leave of the lessor. He may underlet and encumber the land with rent and other charges. If the deed passes all the estate, or time, of the termor, it is an assignment; but if it be for less than the whole term, it is an under-lease and leaves a reversion in the termor.

8. *May leases operate by way of estoppel?*—98.

Yes; when they are not supplied from the ownership of the lessor, but are made by persons who have no vested interest at the time.

9. *How may a term for years be defeated?*—99, 100.

By way of merger, when it meets another term immediately expectant thereon. The elder term merges in the term in reversion or remainder. A merger also takes place, when there is a union of the freehold or fee and the term, in one person, in the same right, and at the same time.

As a general rule, equal estates will not drown in each other. The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person.

10. *What is a surrender?*—103, 104.

Surrender is the yielding up of an estate for life or years to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement. It may be made expressly, or be implied in law. The latter is when an estate, incompatible with the existing estate, is accepted; or the lessee takes a new lease of the same lands.

11. *Is a tenant for years entitled to emblements?*—109.

Not if the lease be for a certain period, and does not depend upon any contingency.

12. *What is an estate at will?*—110–115.

An estate at will is where one man lets land to another, to

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hold at the will of the lessor. But estates at will have become almost extinguished, under the operation of judicial decisions converting them into tenancies from year to year, when the tenant is suffered by the landlord to enter on the possession of a new year. The New York Revised Statutes authorize a summary proceeding to regain possession where the tenant for one or more years, or for a part of a year, or at will, or at sufferance, holds wrongfully against his landlord; but one month's notice to remove must be given to a tenant at will, or sufferance, before application be made for process under the act. Summary proceedings have also been provided in such cases by statute in Pennsylvania, Maine and other States.

13. *Who is a tenant at sufferance?*—116.

A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong, after the determination of his interest.

LECTURE LVII.

OF ESTATES UPON CONDITION.

1. *What are estates upon condition, and how are they divided by Littleton?*—121.

Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed.

2. *What are estates upon condition in law?*—121.

They are such as have a condition impliedly annexed to them, without any condition specified in the deed or will.

3. *Of what extraction is the doctrine of estates upon condition, and from what did it result?*—122.

It is of feudal extraction, and resulted from the obligations arising out of the feudal relation.

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4. *What are conditions in a deed?*—123.

The conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid, or defeat an estate; as if a man (to use the case put by Littleton) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and hold the lands free of the feoffment. So, if a grant be to A in fee, with a proviso, that if he did not pay twenty pounds by such a day, the estate should be void. It is usual, in the grant, to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the condition; but the grantor and his heirs may enter, and take advantage of the breach, by ejectment, though there be no clause of entry.

5. *How are conditions in a deed divided?*—124.

Into general and special. The former puts an end altogether to the tenancy, on entry for the breach of the condition; but the latter only authorizes the reversioner to enter on the land, and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled.

6. *When are conditions precedent, and when subsequent?*—124, 125.

That is a matter of construction, and depends upon the intention of the party creating the estate. A precedent condition is one which must take place before the estate can vest, or be enlarged; as if a lease be made to B, for a year, to commence from the first day of May thereafter, upon condition that B pay a certain sum of money within the time; or if an estate be limited to A upon his marriage with B; here the payment of the money in one case, and the marriage in the other, are precedent conditions, and until the condition be performed, the estate can not be claimed or vest. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated; as, on failure of payment of rent, or performance of other services annexed to the estate.

7. *What is a conditional limitation?*—126.

If a condition subsequent be followed by a limitation over

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to a third person in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation.

8. *What is a collateral limitation?*—129.

It is another refinement belonging to this abstruse subject of limited and conditional estates. It gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral events, as a limitation of an estate to a man and his heirs, tenants of the manor of Dale, or to a woman during widowhood, or to C till the return of B from Rome, or until B shall have paid him twenty pounds. The event marked for the determination of the estate is *collateral* to the time of continuance.

9. *How are conditions subsequent regarded by courts of justice?* 129–132.

They are not favored in law, and are construed strictly, because they tend to destroy estates. And if it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is preferable for the tenant.

LECTURE LVIII.

OF THE LAW OF MORTGAGE.

1. *What is a mortgage?*—135.

It is the conveyance of an estate, by way of pledge, for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default, or by judicial decree.

2. *From what does the English law of mortgages appear to have been borrowed?*—136.

From the civil law; and the Roman *hypotheca* corresponded very closely with the description of a mortgage in our law.

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3. *Is there not a material distinction to be noticed between a pledge and a mortgage?*—138.

Yes: a pledge or pawn is a deposit of goods, redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge and is essential to its validity. The general property does not pass, as in the case of a mortgage, and the pawnee has only a special property.

4. *Where is the condition of a mortgage usually to be found?*—141.

It is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument, and if it be executed subsequently, it will relate back to the date of the deed. But the deed and defeasance should be recorded together. An omission to have the defeasance registered would make the estate, which was conditional between the parties, absolute against every person but the original parties and their heirs.

5. *What effect has the intention of the parties on this point?*—142.

It determines the character of the conveyance in equity; and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the repayment of money, will make it such, and give to the mortgagor the right of redemption.

6. *Is parol evidence admissible to show that a deed, absolute on its face, was intended as a mortgage?*—142, 143, *n.* (*b.*)

It is in equity, but the Court of Errors in New York has held such evidence not admissible in a court of law.

7. *What is a conditional sale?*—144.

It is a sale, with an agreement for a repurchase within a given time; and this is entirely distinct from a mortgage.

8. *What may be mortgaged?*—144.

Property of every kind, real and personal, which is capable of sale.

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9. *Does the mortgage raise an implied covenant to pay the money borrowed?*—145.

No; there must be an express covenant to pay, or the remedy of the mortgagee will be confined to the land. But the absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage.

10. *To what class of powers does the power to sell contained in a mortgage belong?*—147.

It is a power appendant or annexed to the estate; is coupled with an interest; is irrevocable and deemed part of the mortgage security; and it vests in any person who, by assignment or otherwise, becomes entitled to the money secured to be paid. And a power to mortgage includes in it a power to execute a mortgage, with a power to sell.

11. *May a mortgage arise in equity, out of the transaction of the parties, without any deed or express contract for that special purpose?*—150.

Yes.

12. *What is now well settled in the English law on this subject?*—150.

It is settled that if the debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the statute of frauds.

13. *In what case, and when, was the earliest decision in support of the doctrine of equitable mortgages, by the deposit of muniments of title?*—151.

In the case of *Russell* v. *Russell*, in 1783, which decision is now deemed an established principle in English law.

14. *Has not the vendor of real estate a lien for the purchase money?*—151, 152, *n.* (*d.*)

He has, under certain circumstances; and the Court of Chancery will appoint a receiver in behalf of the vendor, if the vendee has obtained the property and refuses to pay. This doctrine, however, has not been received in all the States, and in some of them only to a limited extent.

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15. *Upon the execution of a mortgage, in whom does the estate vest?*—154.

It vests in the mortgagee, subject to be defeated upon performance of the condition.

16. *Can the mortgagor be treated by the mortgagee as a tres passer?*—155.

No, he can not; neither shall his assignee, until the mortgagee has regularly recovered possession, by writ of entry or ejectment. The mortgagor in possession is considered to be so with the mortgagee's assent, and is not liable to be treated as a trespasser.

17. *Is not the mortgagor allowed, in New York, even to sustain an action of trespass against the mortgagee, or those claiming under him, if he undertakes an entry while the mortgagor is in possession?*—155.

He is.

18. *How was it anciently held?*—155, 156, *n.* (*e.*)

It was anciently held that so long as the mortgagor remained in possession, with the consent of the mortgagee, and without any convenant for the purpose, he was a tenant at will. Now, by the New York Revised Statutes, the mortgagee is driven to rely upon a special contract for the possession, if he wishes it, or to the remedy by foreclosure and sale, upon a default.

19. *What is the equity doctrine in regard to mortgages?*—159, 160.

It is, that the mortgage is a mere security for the debt, and only a chattel interest; and that, until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is, accordingly, held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.

20. *Have not the courts of law also, in modern times, adopted the equity view of the subject?*—160.

Yes; except as against the mortgagee, the mortgagor,

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while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for the debt.

21. *Will an action at law, by the mortgagee, lie for the commission of waste?*—161, 162.

No; because he has only a contingent interest; and yet actions of trespass, *quare clausum fregit*, by the mortgagee, for the commission of waste, by destroying timber, or removing fixtures, have been sustained against the mortgagor in possession, in those States where they have no separate equity courts with the plenary powers of a Court of Chancery.

22. *Who is entitled to redeem?*—162.

The right of redemption exists not only in the mortgagor himself, but in his heirs, and personal representatives, and assignee, and in every other person who has an interest in or a legal or equitable lien upon the lands.

23. *If the mortgagee obtains possession of the mortgaged premises before foreclosure, for what will he be accountable?*—166.

For the actual receipts of rents and profits, and nothing more, unless they were reduced, or lost by his willful default, or gross negligence. He imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received.

24. *How about registering the mortgage?*—168.

By the statute law of New York every conveyance of real estate, whether absolute or by way of mortgage, must be recorded in the county in which the land is situated; if not, it is void as against any subsequent purchaser or mortgagee, in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded. And this may be said, generally, to be the substance of the statute law on the subject in every State of the Union, though in some of them the recording is still more severely enforced.

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25. *What follows if the subsequent purchaser had notice of a prior deed?*—169–171.

It is a settled rule that if a subsequent purchaser or mortgagee, whose deed is registered, had notice, at the time of making his contract, of the prior unregistered deed, he shall not avail himself of the priority of his registry to defeat it; and the prior unregistered deed is the same to him as if it had been registered. The whole of the English equity doctrine of notice prevails in New York, and, probably, in all the other States of the Union.

26. *Has a mortgage not registered a preference over a subsequent docketed judgment?*—173.

Yes; a mortgage unregistered is still a valid conveyance, and binds the estate.

27. *Suppose the purchaser at the sale on execution, under the judgment, has his deed first recorded, who then will have the preference, and on what will the question of right turn?*—173.

The purchaser will gain a preference by means of the record over the mortgage, and the question of right turns upon the fact of priority of the record, in cases free from fraud.

28. *How is the rule in Pennsylvania on this subject?*—173.

In Pennsylvania the docketed judgment is preferred, and not unreasonably; for there is much good sense, as well as simplicity and certainty, in the proposition that every incumbrance, whether it be a registered deed or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of the lien upon record, which is open for public inspection.

29. *Can future advances be secured by mortgage?*—175.

A mortgage or judgment may be taken as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement. But subsequent advances can not be tacked to a prior mortgage to the prejudice of a *bona fide* junior incumbrancer, or where there is an intervening equity.

30. *Does the English doctrine of tacking junior to senior mortgages prevail in this country?*—176–179.

No.

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31. *What is the practice with us in proceeding to foreclose a mortgage?*—181.

In New York, Maryland, Virginia, South Carolina, Tennessee, Kentucky, Indiana, and, probably, several other States, the practice is to obtain a decree for the sale of the mortgaged premises, under the direction of an officer of the court, who applies the proceeds of the sale toward the discharge of incumbrances according to priority.

32. *May the right of equity of redemption be barred by the length of time?*—186–189.

It may. And the mortgagee may equally, on his part, be barred by lapse of time.

33. *If the mortgagee omits to give proper notice, whether directed by the power or not, may not the sale be impeached in chancery?*—190.

It may.

34. *Is not the sale under a power, if regularly and fairly made, according to the directions of the statute, a final and conclusive bar to the equity of redemption?*—190.

It is.

35. *How long has this been the policy and language of the law of New York?*—191.

From the time of the first introduction of the statute regulation on the subject, in March, 1774.

36. *Will a sale under a power, as well as under a decree, bind the infant heirs?*—191.

It will; for the infant has no day, after he comes of age, to show cause, as he has where there is the strict technical foreclosure, and as he generally has in the case of decrees.

37. *Has a court of equity a competent power to require, by injunction, and enforce by process of execution, delivery of possession?*—192.

It has; and the power is founded upon the simple elementary principle, that the power of the court to apply the remedy is co-extensive with its jurisdiction over the subject-matter.

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38. *Does the English practice of opening biddings on a sale of mortgaged premises, under a decree, prevail to any great extent in this country?*—192.

No.

LECTURE LIX.

OF ESTATES IN REMAINDER.

1. *Of what two kinds are estates in expectancy?*—197.

The first is created by the act of the parties, and called a *remainder;* the second by the act of the law, and is called a *reversion.*

2. *Under how many heads are remainders treated?*—197.

Under nine, viz.,

1. Of the general nature of remainders.
2. Of vested remainders.
3. Of contingent remainders.
4. Of the rule in Shelley's case.
5. Of the particular estate.
6. Of remainders limited by way of use.
7. Of the time within which a continguent remainder must vest.
8. Of the destruction of contingent remainders.
9. Of some remaining properties of contingent remainders.

3. *What is a remainder?*—197.

It is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.

4. *How, by the New York Revised Statutes, is a remainder defined?*—198, *n.* (*a.*)

It is defined to be an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate, created at the same time; and

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where a future estate is dependent on a precedent estate, it is a remainder, and may be created and transferred as such.

5. *Of what may a remainder consist?*—198.

It may consist of the whole remnant of the estate; as in the case of a lease to A for years, remainder to B in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it left vested in the grantor, as in the case of a grant to A for years, remainder to B for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee.

6. *Can a remainder be created after a grant of the fee?*—199, *n.* (*a.*)

Not at common law; but, by the New York Revised Statutes, a contingent remainder in fee may be created on a prior remainder in fee, and to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. So, by the same statutes, a fee may be limited on a fee, upon a contingency which, if it should occur, must happen within two lives in being at the creation of the estate.

7. *What are cross-remainders?*—201.

They are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A, and of another lot to B, in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C in fee, A and B have cross-remainders over by express terms; and on the failure of either, the other, or his issue, takes, and the remainder to C is postponed; but if the devise had been to A and B of lots to each, and remainder over on the death of both of them, the cross-remainders to them would be implied.

8. *Of how many sorts are remainders?*—202.

Two; vested and contingent.

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9. *What is the definition of a vested remainder, by the New York Revised Statutes?*—202.

It is "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate."

10. *How does the law regard vested remainders?*—203.

The law favors vested estates, and no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested.

11. *What distinguishes vested from contingent remainders?*—203.

The present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines.

12. *What is a contingent remainder?*—206.

A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate.

13. *What distinguishes contingent from vested interests?*—206.

The uncertainty of the *right* of enjoyment in future, and not the uncertainty of that enjoyment itself.

14. *What must be the nature of the contingency on which the remainder is made to depend?*—206, *n.* (*a.*)

At common law it must be a common or near possibility, and not what the law terms a possibility on a possibility. But in New York, under the Revised Statutes, no future estate, otherwise valid, shall be void on account of the probability or improbability of the contingency on which it is limited to take effect.

15. *Into what four classes are contingent remainders divided?*—207, 208.

1. The first sort is where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in futuro* will ever vest.

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Thus, if A makes a feoffment to the use of B, till from Rome, and after such return, remainder over in fe mainder depends entirely on the uncertain or contingent ination of the estate in B, by the return of C from Rome.

2. The second sort is where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate, and must precede the remainder. As if a lease be to A for life, remainder to B for life, and if B dies before A, remainder to C for life; the event of B dying before A does not affect the determination of the preceding estate, but it is a dubious event which must precede, in order to give effect to the remainder in C.

3. A third kind is where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. Thus, if a grant be made to A for life, and, after the death of B, to C in fee; here, if the death of B does not happen until after the death of A, the particular estate is determined before the remainder is vested, and it fails from the want of a particular estate to support it.

4. The fourth class of contingent remainders is, where the person to whom the remainder is limited is not ascertained, or not in being. As in the case of a limitation to two persons for life, remainder to the survivor of them; or in the case of a lease to A for life, remainder to the right heirs of B, then living. B can not have heirs while living, and if he should not die until after A, the remainder is gone, because the particular estate failed before the remainder could vest.

16. *Is there not a distinction which operates by way of exception to the third class of contingent remainders?*—209.

There is; thus, a limitation for a long term of years, as, for instance, to A for eighty years, if B should live so long, with the remainder over, after the death of B, to C in fee, gives a *vested* remainder to C, notwithstanding it is limited to take effect on the death of A, which possibly may not happen until after the preceding estate for eighty years.

17. *Do not exceptions exist also to the generality of the rule which governs the fourth class of remainders?*—209, 210.

They do; thus, if the ancestor takes an estate of freehold,

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and an immediate remainder is limited thereon, in the same instrument, to his heirs in fee, or in tail, the remainder is not contingent, or in abeyance, but is immediately executed in possession in the ancestor, and he becomes seised in fee, or in tail. So, if some intermediate estate for life, or in tail, be interposed between the estate of freehold in A and the limitation to his heirs, still the remainder to his heirs vests in the ancestor, and does not remain in contingency or abeyance. If there be created an estate for life to A, remainder to the heirs of his body, this is not a contingent remainder to the heirs of the body of A, but an immediate estate tail in A; or if there be an estate for life to A, remainder to B for life, remainder to the right heirs of A, the remainder in fee is here vested in A, and after the death of A, and the determination of the life estate in B, the heirs of A take by descent as heirs, and not by purchase. The possibility that the freehold in A may determine in his lifetime, does not keep the subsequent limitation to his heirs from attaching in him; and it is a general rule, that when the ancestor takes an estate of freehold, and there be in the same conveyance an unconditional limitation to his heirs, in fee, or in tail, either immediately, without the intervention of any estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately with the interposition of some such intervening estate; the subsequent limitation vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession, or a vested remainder.

18. *What is this rule called, and what is the present law in New York on this point?*—211, *n.* (*d.*)

The rule in Shelley's case. The New York Revised Statutes have done away with the rule in Shelley's case, and enacted that where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate in the same person shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as *purchasers*, by virtue of the remainder so limited to them.

19. *How has Mr. Preston defined the rule in Shelley's case?*—215.

His definition of the rule is as follows: "When a person

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takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

20. *Must there be a particular estate to precede a remainder?*—233.

Yes; for it necessarily implies that a part of the estate has already been carved out of it, and vested in immediate possession in some other person.

21. *Must the particular estate be valid in law, and formed at the same time, and by the same instrument, with the remainder?*—233.

Yes.

22. *If the particular estate be void in its creation, or be defeated afterward, will the remainder created by a conveyance at common law, resting upon the same title, be defeated also?*—235.

It will, as being, in such a case, a freehold commencing *in futuro*.

23. *When must the interest to be limited as a remainder, either vested or contingent, commence or pass out of the grantor?*—248.

At the time of the creation of the particular estate, and not afterward.

24. *Must the remainder be so limited as to await the natural determination of the particular estate?*—249.

It must, and can not take effect in possession upon an event which prematurely determines it.

25. *Do not the New York Revised Statutes allow a remainder to be limited on a contingency?*—250–252.

They do; on a contingency which, in case it should happen, would operate to abridge or determine the precedent estate; and every such remainder is to be construed a conditional limitation, and to have the same effect as such a limitation would have at law.

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They have also made many other changes in the common law doctrine of remainders. Thus, a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the prior estate determines before the person to whom it is limited attains the age of twenty-one. No remainder can be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such a remainder be a fee; nor can a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term. Nor can a remainder be made to depend upon more than two successive lives in being; and if more lives be added, the remainder takes effect upon the death of the first two persons named. A contingent remainder can not be created on a term for years, unless the nature of the contingency on which it is limited be such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate. A freehold estate, as well as a chattel real (to which these regulations apply), may be made to commence at a future day; and an estate for life may be created in a term of years, and a remainder limited thereon; and a remainder of a freehold or chattel interest, either contingent or vested, may be created expectant on the determination of a term of years. Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it; and no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect. When a remainder on an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years. No expectant estate shall be defeated or barred by any alienation or other act of the owner of the intermediate estate, nor by any destruction thereof, except by some act or means which the party creating the estate shall, in the creation thereof, have provided for or au-

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thorized. Nor shall any remainder be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; and the remainder takes effect when the contingency happens, in the same manner and to the same extent as if the precedent estate had continued.

But these provisions do not affect interests which became vested, nor instruments which took effect, before the 1st of January, 1830.

26. *By what are conveyances to uses governed?*—257.

By doctrines derived from courts of equity; and the principles, which originally controlled them, they retained when united with the legal estate.

27. *Are all contingent and executory interests assignable in equity?*—261, 262.

They are; and will be enforced, if made for a valuable consideration; and it is settled, that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and devisable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they can not be either devised, or descend, at common law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens.

LECTURE LX.

OF EXECUTORY DEVISES.

1. *What is an executory devise?*—263.

It is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law.

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2. *What if the limitation by will does not depart from those rules prescribed for the government of contingent remainders?*—263.

It is in that case a contingent remainder, and not an executory devise.

3. *For what reason were executory devises instituted?*—263.

To support the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.

4. *What does the history of executory devises present?*—264.

An interesting view of the stable policy of the English common law, which abhorred pepetuities, and the determined spirit of the courts of justice to uphold the policy, and keep property free from the fetters of entailments, whatever modification or form they might assume.

5. *What is the English rule relative to limitations by way of executory devise?*—267, *n.* (*a.*)

That real or personal estate may be limited by way of executory devise for a life or any number of lives in being and twenty-one years afterwards, and the fraction of another year to reach the case of a posthumous child. And the House of Lords have recently decided that the term of twenty-one years may be added as a term in gross, without reference to the infancy of any person who is to take under such limitation.

6. *How many kinds of executory devises are there relative to real estates?*—268.

Two.

7. *What is the first?*—268.

The first is where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. Thus, if there be a devise to A for life, remainder to B in fee, provided that if C should, within three months after the death of A, pay one thousand dollars to B, then to C in fee, this is an executory devise to C, and

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if he dies in the lifetime of A, his heirs may perform the condition.

8. *What is the second?*—268, 269.

The second is where a testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time; as in the case of a devise to the heirs of B, after the death of B, or a devise to B in fee, to take effect six months after the testator's death, or a devise to the daughter of B, who shall marry C within fifteen years.

9. *In what three very material points does an executory devise differ from a remainder?*—269, 270.

1. An executory devise needs not any particular estate to precede and support it, as in the case of a devise in fee to A upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens, the fee passes in the usual course of descent to the heirs at law.

2. A fee may be limited after a fee, as in the case of a devise of land to B in fee, and if he dies without issue, or before the age of twenty-one, then to C in fee.

3. A term for years may be limited over, after a life estate created in the same. At law, the grant of the term to a man for life would have been a total disposition of the whole term. Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever in the estate out of which, or subsequently to which, it is limited. The executory interest is wholly exempted from the power of the first devisee or taker.

10. *What restrictions have the New York Revised Statutes put on the English rule, as to limitations by way of executory devise?*—271.

They have enacted that since the 1st of January, 1830, the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except in the single instance of a contingent remainder in fee, which may be created on a prior remainder in fee, to take effect in the event, that the persons to whom the first

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remainder is limited shall die under the age of twenty-one years; or upon any other contingency, by which the estate of such persons may be determined before they attain their full age. Every future estate is declared to be void in its creation, which suspends the absolute power of alienation for longer than that period.

11. *If an executory devise be limited to take effect after a dying* without heirs, *or* without issue, *or* on failure of issue, *or* without leaving issue, *is the limitation held to be void?*—273.

It is; because the contingency is too remote, as it is not to take place until after an indefinite failure of issue. But, if the testator meant that the limitation over was to take effect on failure of issue *living at the time of the death* of the person named as the first taker, then the contingency determines at his death, and no rule of law is broken, and the executory devise is sustained.

12. *What is a definite failure of issue?*—274.

A definite failure of issue is, when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A, but if he *dies without lawful issue living at the time of his death.*

13. *What is an indefinite failure of issue?*—274

It is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen.

14. *How have both the English and American courts construed a devise in fee, with a remainder over if the devisee dies without issue, or heirs of the body?*—276-278.

As a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote, and founded on an indefinite failure of issue. But if it appears, from the will, that the testator meant issue *living at the death* of the first taker, the limitation over is good by way of executory devise; and our courts have shown a disposition to discover such intention in wills.

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15. *What statutory provisions have been made on this subject in New York and some of the other States?*—279–280.

In Virginia, by statute, in 1819, and in Mississippi, by the Revised Code of 1824, and in North Carolina by statute in 1827, the rule of construction of devises, as well as deeds, with contingent limitations depending upon the dying of a person without heirs, or without heirs of the body, or issue, or issue of the body, or children, was declared to be that the limitation should take effect on such dying without heirs or issue living at the time of the death of the first taker, or born within ten months thereafter. The New York Revised Statutes have declared, that where a remainder in fee shall be limited upon any estate which would be adjudged a fee tail, according to the law of the State as it existed before the abolition of entails, the remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of his death. It is further declared, that when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words *heirs or issue* shall be construed to mean heirs or issue living at the death of the person named as ancestor; and provision is made, that posthumous children shall be entitled to take in the same manner as if living at the death of their parent.

16. *What is the effect of these provisions in the Revised Statutes of New York?*—280.

They sweep away, at once, the whole mass of previous English and American adjudications on the meaning, force and effect of such limitations.

17. *Have not the New York Revised Statutes put an end to all semblance of any distinction in the contingent limitations of real and personal estates?*—283.

They have, by declaring that all the provisions relative to future estates should be construed to apply to limitations of chattels real, as well as of freehold estates; and that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the termination, of not more

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than two lives in being at the date of the instrument containing the limitation or condition, or, if it be a will, in being at the death of the testator.

18. *When there is an executory devise of the real estate, and the freehold is not, in the mean time, disposed of, to whom does the inheritance descend?*—284.

To the testator's heir, until the event happens. A similar rule applies to an executory devise of personal estate; and the intermediate profits, as well before the estate is to vest, as between the determination of the first estate and the vesting of a subsequent limitation, will fall into the residuary personal estate.

19. *Have not the New York Revised Statutes allowed the accumulation of rents and profits of real estate, for the benefit of one or more persons, by will or deed?*—286.

They have; but the accumulation must commence, either on the creation of the estate out of which the rents and profits are to arise, and it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, if directed to commence at any time subsequent to the creation of the estate, it must commence within the time authorized by the statute for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate at the expiration of such minority. If the direction for accumulation be for a longer time than during the minorities aforesaid, it shall be void for the excess of time; and all other directions for the accumulation of rents and profits of real estate are void. It is further provided, that whenever there is, by a valid limitation, a suspense of the power of alienation, and no provision made for the disposition, in the mean time, of the rents and profits, they shall belong to the persons presumptively entitled to the next eventual estate.

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LECTURE LXI.

OF USES AND TRUSTS.

1. *What is a use?*—288.

A use is where the legal estate of land is in A, in trust that B shall take the profits, and that A will make and execute estates according to the direction of B.

2. *What was the trustee, to all intents and purposes?*—288.

He was the real owner of the estate at law.

3. *What title had the* cestui que use ?—288.

He had only a confidence or trust, for which he had no remedy at the common law.

4. *Did uses exist under the Roman law, and, if so, under what name?*—289.

They did, exist under the name of *fidei commissa*, or trusts.

5. *By whom were they introduced, and for what purpose?*—289.

They were introduced by testators, to evade the municipal law, which disabled certain persons, as exiles and strangers, from being heirs or legatees.

6. *Was not the contrast between uses and estates at law extremely striking?*—292.

Yes; when uses were created, before the statute of uses, there was a confidence that the feoffee would suffer the feoffor to take the profits, and that the feoffee, upon the request of the feoffor, or notice of his will, would execute the estate to the feoffor and his heirs, or according to his directions. When the direction was complied with, it was essentially a conveyance by the feoffor, through his agent the feoffee, who, though even an infant or *feme covert*, was deemed in equity competent to exe-

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cute a power and appoint a use. The existing law of the land was equally eluded in the selection of the appointee, who might be a corporation, or alien, or traitor, and in the mode of the direction, which might be by parol.

7. *What was enacted by the Statute of Uses?*—294.

The statute of 27 Henry VIII, commonly called the Statute of Uses, transferred the uses into possession, by turning the interest of the *cestui que use* into a legal estate, and annihilating the intermediate estate of the feoffee; so that, if a feoffment was made to A and his heirs, to the use of B and his heirs, B, the *cestui que use*, became seised of the legal estate, by force of the statute. The legal estate, as soon as it passed to A, was immediately drawn out of him and transferred to B, and the use and the land became convertible terms.

8. *How were uses afterwards conveyed?*—296.

The statute having turned uses into legal estates, they were thereafter conveyed as legal estates, in the same manner and by the same words.

9. *How do shifting or secondary uses take effect?*—296.

They take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it.

10. *How are springing uses limited?*—297, 298.

They are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest.

11. *How do future or contingent uses take effect?*—298.

They take effect as remainders. If lands be granted to A in fee, to the use of B, on his return from Rome, it is a future contingent use, because it is uncertain whether B will ever return.

12. *If the use limited by deed expired, or could not vest, or was not to vest but upon a contingency, to whom did the use result back?*—299.

To the grantor who created it.

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13. *Is the rule the same when no uses were declared by the conveyance?*—299.

Yes.

14. *How are trusts created?*—305.

Though there be no particular form of words requisite to create a trust, if the intention be clear, yet the English statute of frauds (which has generally been adopted with us) requires the declaration, or creation, of trusts of lands to be manifested and proved by some writing signed by the party creating the trust; and all grants or assignments of any trust or confidence are also to be in writing, and signed in like manner.

15. *What are resulting trusts?*—305.

They are trusts implied by law from the manifest intention of the parties, and the nature and justice of the case; and such trusts are expressly excepted from the operation of the statute of frauds. Thus, where an estate is purchased in the name of A, and the consideration money is actually paid, at the time, by B, there is a resulting trust in favor of B, provided the payment of the money be clearly proved.

16. *Will not a court of equity regard and enforce trusts in other cases?*—307.

Yes, in a variety of them; where substantial justice and the rights of third persons are concerned.

17. *What objections were made to uses and trusts, as they then existed, in the remarks which accompanied the bill for the revision of the New York statutes?*—299.

The three following, viz.,

1. They render conveyances more complex, verbose and expensive than is requisite, and perpetuate in deeds the use of a technical language, unintelligible as a "mysterious jargon," to all but the members of one learned profession.

2. Limitations, intended to take effect at a future day, may be defeated by a disturbance of the seisin, arising from a forfeiture or a change of the estate of the person seised to the use.

3. The difficulty of determining whether a particular limit-

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ation is to take effect as an executed trust, as an estate at common law, or as a trust.

18. *How were these objections regarded?*—299, 300.

They were deemed so strong and unanswerable as to induce the revisers to recommend the entire abolition of uses. They considered, that by making a grant, without the actual delivery of possession, or livery of seisin, effectual to pass every estate and interest in land, the utility of conveyances deriving their effect from the statute of uses would be superseded; and that the new modifications of property, which uses have sanctioned, would be preserved by repealing the rules of the common law by which they were prohibited, and permitting every estate to be created by grant which can be created by devise.

19. *What have the New York Revised Statutes declared respecting uses and trusts, except as authorized or modified thereby?*—300.

They have declared, that they were abolished, and that every estate and interest in land is a legal right, or cognizable in the courts of law, except where it is otherwise therein provided; and that every estate held as a use executed under any former statute is confirmed as a legal estate. The conveyance by grant is a substitute for the conveyance to uses; and future interests in land may be conveyed by grant, as well as by devise. The statute gives the legal estate, by virtue of a grant, assignment, or devise; and the word *assignment* was introduced to make the assignment of terms, and other chattel interests, pass the legal interest in them, as well as in freehold estates; though, under the English law, the use in chattel interests was not executed by the statute of uses.

20. *Will not the operation of the statute of New York, in respect to the doctrine of uses, have some slight effect upon the forms of conveyance?*—300, 301.

Yes; it may give them more brevity and simplicity. But, it would be quite visionary to suppose that the science of law, even in the department of conveyancing, will not continue to have its technical language, and its various, subtle, and profound learning, in common with every other branch of human science. The transfer of property assumes so many modifications, to meet

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the varying exigencies of speculation, wealth, and refinement, and to supply family wants and wishes, that the doctrine of conveyancing must continue essentially technical, under the incessant operation of skill and invention. The abolition of uses does not appear to be of much moment, but the changes which the law of trusts has been made to undergo, becomes extremely important.

21. *What two classes of trusts are retained by the Revised Statutes?*—309.

First, Resulting trusts. And second, Express or active trusts, as where the trustee is clothed with some actual power of disposition or management, which can not be properly exercised without giving him the legal estate and actual possession.

22. *To what extent are express or active trusts allowed?*—310.

1. To sell land for the benefit of creditors.

2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of lands, and apply them to the use of any person; or to accumulate the same for the purposes, and within the limits, already mentioned.

23. *May the court accept the resignation of a trustee?*—311.

Yes; and it may also discharge him, or remove him for just cause, and supply the vacancy, or any want of trustees, in its discretion.

24. *Was it not the object of the New York Revised Statutes to abolish all trusts, except the express trusts which are enumerated, and resulting trusts?*—311.

It was.

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LECTURE LXII.

OF POWERS.

1. *What are the powers with which we are most familiar in this country?*—315.

The common law authorities, of simple form and direct application: such as a power to sell land, to execute a deed, to make a contract, or to manage any particular business; with instructions more or less specific, according to the nature of the case.

2. *Are there not other powers?*—315.

Yes; powers deriving their effect from the statute of uses.

3. *What are those powers, and how have the estates, arising from the execution of them, been classed?*—315.

They are declarations of trust, and modifications of future uses; and the estates arising from the execution of them have been classed under the head of contingent uses.

4. *What are all these powers in point of fact?*—315.

Powers of revocation and appointment.

5. *Who are the parties concerned in making a power?*—316, *n.* (*e.*)

They are the donor, who confers the power, the appointor or donee, who executes it, and the appointee, or person in whose favor it is executed. The New York Revised Statutes have substituted the words *grantor* and *grantee* for *donor* and *donee.*

6. *How are powers usually classed?*—317.

Into, 1. Powers appendant, or appurtenant. 2. Powers collateral, or in gross. And 3. Powers simply collateral. This classification of powers is admitted to be important only with reference to the ability of the donee to suspend, extinguish, or merge the power: and it is condemned as being too artificial and arbitrary.

7. *How is a power defined by the New York Revised Statutes?*—318, *n.* (*f.*)

The New York Revised Statutes have abolished powers at

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common law, as well as powers under the statute of uses, so far as they related to land, except it be a simple power of attorney to convey lands for the benefit of the owner. They have defined a power to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform; and it must be granted to some person capable at the time of alienating such interest in the land.

8. *How has the statute of New York divided powers?*—318.

Into general and special. A general power authorizes the alienation in fee, by deed, will, or charge, to any alienee whatever. The power is special when the appointee is designated, or a lesser interest than a fee is authorized to be conveyed.

9. *When is a power beneficial under the New York law?*—318.

It is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

10. *When is a general, and when a special, power said to be in trust, under the New York Revised Statutes?*—318, 319.

A general power is in trust, when any person other than the grantee of the power is designated as entitled to the whole, or part of the proceeds, or other benefit to result from the execution of the power. And a special power is in trust, when the dispositions it authorizes are limited to be made to any person other than the grantee of the power; or when any person other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.

11. *Is any formal set of words requisite to create or reserve a power?*—319.

None at all; it may be created by deed or will; and it is sufficient that the intention be clearly defined.

12. *What is the effect of a devise of an estate for life, with a power to appoint the fee, annexed?*—319.

The devisee takes only an estate for life, unless there should be some manifest general intent of the testator which would be defeated by such a construction.

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13. *What have the New York Revised Statutes provided in such a case?*—320.

They have declared that where an absolute power of disposition, not accompanied by any trust, or a general and beneficial power to devise the inheritance, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands sold for debt. So, if a like power of disposition be given to any person to whom no particular estate is limited, he takes a fee, subject to any future estates limited thereon, but absolute in respect to creditors and purchasers. The absolute power of disposition exists, when the grantee is enabled, in his lifetime, to dispose of the entire fee, for his own benefit.

14. *Is there any distinction between a devise of lands to executors to sell, and a devise that executors shall sell the lands?*—320.

Yes; the former gives them an interest in the lands, the latter gives them but a power.

15. *Have the New York Revised Statutes interfered with this distinction?*—321.

Yes; they declare that a devise of lands to executors, or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power

16. *Who may execute powers?*—324, 325.

Every person capable of disposing of an estate actually vested in himself may exercise a power, or direct a conveyance of the land. Infants may execute powers simply collateral, and a *feme covert* may execute any kind of power without the concurrence of her husband.

17. *Who may execute under the New York Revised Statutes?*—325.

By the New York Revised Statutes, though a power may

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be vested in any person capable in law of holding, it can not be exercised by any person not capable of aliening lands, except in the case of a married woman.

18. *Whence does the appointee under a power derive his title?*—327.

From the instrument by which the power of appointment was created.

19. *When the mode in which a power is to be executed is not defined, in what way may it be executed?*—330.

It may be executed by deed or will, or simply by writing. But the conditions annexed to the execution of the power should be strictly complied with.

20. *Have not the New York Revised Statutes made some amendments to the law respecting the execution of powers?*—333.

Yes; they have enacted (among other things), that if the conditions annexed to a power be merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power. In all other respects, the intention of the grantor of a power, as to the mode, time and conditions of its execution, must be observed, subject to the power of the court to supply defective executions.

21. *May the power be executed without reciting it?*—334.

It may; or even referring to it, provided the act shows that the donee had in view the subject of the power.

22. *May a power of revocation and new appointment be reserved in a deed executing a power?*—336.

Yes; though the deed creating the power does not authorize it, and such powers may be reserved *toties quoties*.

23. *What have the New York Revised Statutes enacted on this point?*—337.

They have declared that powers that are beneficial, or in trust, are irrevocable, unless an authority to revoke them be granted or reserved in the instrument creating the power. They

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have also declared, that where the grantor in any conveyance shall reserve to himself for his own benefit an absolute power of revocation, he shall be deemed the absolute owner of the estate, so far as the rights of creditors and purchasers are concerned.

24. *What is the rule of equity with regard to a general power of appointment?*—339.

The Court of Chancery holds that where a person has a *general* power of appointment over property, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, and be subject to the claims of creditors, in preference to the claim of the appointee. The party must have executed the power, or done some act indicating an intention to execute it; for it is perfectly well settled in the English law, that though equity will in certain cases aid a defective execution of a power, it will not supply the total want of any execution of it.

25. *What provision has been made on this point by the New York Revised Statutes?*—341.

By them every special and beneficial power is made liable in equity to the claims of creditors, and the execution of the power may be decreed for their benefit.

26. *What is a leading rule as regards the construction of powers?*—345.

The intention of the donor of the power is the great principle that governs in the construction of powers; and, in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose.

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LECTURE LXIII.

OF ESTATES IN REVERSION.

1. *What is a reversion?*—353.

A reversion is the return of land to the grantor and his heirs, after the grant is over; or, according to the formal definition in the New York Revised Statutes, it is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

2. *What does a reversion necessarily assume?*—353.

That the original owner has not parted with his whole estate or interest in the land.

3. *From what does Sir William Blackstone say that the doctrines of reversion are derived?*—353, 354.

From the feudal constitution; but it would have been more correct to have said, that some of the incidents attached to a reversion were of feudal growth, such as fealty, and the varying rule of descent between the cases of a reversion arising out of the original estate, and one limited by the grant of a third person.

4. *Does a reversion arise by operation of law, or by deed or will?*—354.

By operation of law. And it is a vested interest or estate inasmuch as the person entitled to it has a fixed right of future enjoyment.

5. *Is not a reversion an incorporeal hereditament?*—354.

It is, and may be conveyed, either in whole or in part, by grant, without livery of seisin.

6. *Are reversions expectant on the determination of estates for years, immediate assets in the hands of the heir?*—354.

They are. But the reversion expectant on the determina-

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tion of an estate for life, is not immediate assets during the continuance of the life estate, and the creditor takes judgment for assets *in futuro*.

7. *Is the reversioner entitled to his action for an injury done to the inheritance?*—355.

He is, because he has a vested interest.

8. *What are the usual incidents to the reversion under the English law?*—355, 356.

Fealty and rent. Fealty, in its feudal sense, does not now exist in this country; but rent is a very important incident, and passes with a grant or assignment of the reversion. It is not inseparable, and may be severed from the reversion, and excepted out of the grant by special words.

LECTURE LXIV.

OF A JOINT INTEREST IN ESTATES.

1. *In what two ways may a joint interest in land be had?*—357.

Either in the title or in the possession.

2. *What are joint tenants?*—357.

Joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.

3. *How are they seised?*—359.

Joint tenants are said to be seised *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole. They have each (if there be two of them, for instance) an undivided moiety of the whole.

4. *What is the doctrine of survivorship, or* jus accrescendi?—360.

It is the distinguishing incident of title by joint tenancy;

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and, therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance.

5. *Did the common law favor the title by joint tenancy?*—361.

It did, by reason of the right of survivorship.

6. *When were estates in joint tenancy abolished in New York?*—361.

As early as February, 1786, estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes have reënacted the provision, and with the further declaration that every estate vested in executors and trustees, as such, shall be held in joint tenancy.

7. *Can husband and wife take by moieties?*—362.

They can not. But they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If an estate be conveyed expressly in joint tenancy to a husband and wife, and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety.

8. *How would it be if the husband and wife had been seised of the lands, as joint tenants, before their marriage?*—363.

They would continue joint tenants afterward, as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture.

9. *How may joint tenancy be destroyed?*—363.

It may be destroyed by destroying any of its constituent unities, except that of time.

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10. *What is the proper conveyance between joint tenants?*—364.

A release; and each has the power of alienation over his *aliquot* share.

11. *How may joint tenants sever the tenancy?*—364.

Either voluntarily by deed, or they may compel a partition by writ of partition, or by bill in equity.

It is to be presumed that the English statutes of 31 and 32 Henry VIII. have been generally reënacted or adopted in this country, and, probably, with increased facilities for partition. They were reënacted in New Jersey, in 1797, and in Virginia in their Revised Code, and in New York, 6th of February, 1788; and the New York Revised Statutes have made further and more specific and detailed provisions for the partition of lands, held either in joint tenancy, or in common, and they have given equal jurisdiction over the subject to the courts of law and of equity. In Massachusetts and Maine, the writ of partition at common law is not only given, but partition may be effected by petition without writ.

12. *When only does a court of equity interfere?*—364, 365.

Only when the title is clear, and never where the title is denied, or suspicious, until the party seeking a partition has had an opportunity to try his title at law. The same principle has been acted upon in the courts of equity in this country.

13. *What have the New York Revised Statutes prescribed to the courts of law and the Court of Chancery, in respect to partition?*—365.

That wherever there shall be a denial of co-tenancy, an issue shall be formed and submitted to a jury to try the fact; and the respective rights of the parties are to be ascertained and settled before partition be made, or a sale directed.

14. *Whom does a final judgment or decree, upon partition at law, under the Revised Statutes, bind?*—365, 366.

It binds all parties named in the proceedings, and having, at the time, any interest in the premises divided, as owners in fee, or as tenants for years; or as entitled to the reversion, remainder or inheritance, after the termination of any particular

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estate ; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower.

But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises subject to the partition. It is likewise provided, in respect to the exercise of equity jurisdiction, in the case of partition, that if it should appear that equal partition can not be made without prejudice to the rights and interests of some of the parties, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. This is the rule in equity, independent of any statute provision, when equality of partition can not otherwise be made.

15. *From what does an estate in coparcenary always arise?*—366.

It always arises from descent. At common law it took place when a man died seised of an estate of inheritance, and left no male issue, but two or more daughters, or other female representatives in a remoter degree. In this case they all inherited equally as co-heirs in the same degree, or in unequal proportions, as co-heirs in different degrees.

16. *In what three unities do coparceners resemble joint tenants?*—366.

Unity of title, interest, and possession.

17. *But do not coparceners differ from joint tenants in other respects in a most material degree?*—366.

They do. They are said to be seised like joint tenants, *per my et per tout*, and yet each parcener has a divisible interest ; and the doctrine of survivorship does not apply to them. The shares of the partners descend severally to their respective heirs. They may sever their possession, and dissolve the estate in coparcenary, by consent, or by writ of partition at common law.

18. *Who are tenants in common?*—367, 368.

They are persons who hold by unity of possession ; and

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they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. The American law differs from the English common law in this respect, that with us a tenancy in common may be created by descent, as well as by deed or will; and whether the estate be created by act of the party or by descent, in either cases tenants in common are deemed to have several and distinct freeholds; for that circumstance is a leading characteristic of tenancy in common.

19. *How are tenants in common seised?*—368.

Each tenant is considered to be solely or severally seised of his share. They are deemed to be seised *per my* but not *per tout.*

20. *What are the incidents of tenancy in common?*—369, 370.

They are similar to those applicable to joint estates. The owners can compel each other, by the like process of law, to a partition, and they are liable to each other for waste, and they are bound to account to each other for due share of the profits of the estate in common. The possession of one tenant in common is the possession of the others, and the taking of the whole profits by one does not amount to an ouster of his companions. One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them; though the rule is limited to those parts of common property, and does not apply to the case of fences inclosing wood or arable lands.

21. *What provision has been made in Massachusetts regarding the repair of mills or dams?*—370, *n.* (*a.*)

By the Massachusetts Revised Statutes of 1836, the greater part of the proprietors in interest of mills or dams, which need reparation, may cause the same to be done at the expense of all, in proportion to their respective interests, after a call, on due notice, of a meeting of all of them.

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LECTURE LXV. B. XIV. 2.

OF TITLE BY DESCENT.

1. *What must there be to constitute a perfect title?*—373.

There must be the union of actual possession, the right of possession, and right of property. These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and the third the right of property. Unless they all be united in one and the same party, there can not be that consolidated right, that *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*, which, according to the ancient English law, formed a complete title.

2. *By what two modes may title to land be acquired?*—373.

By descent and by purchase; the one is acquired by operation of law, and the other by the act or agreement of the parties.

3. *What is a descent or hereditary possession?*—374.

It is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. In the United States, the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself.

4. *What is the first rule of inheritance?*—375.

It is, that if a person owning real estate dies seised, or as owner, without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be.

5. *Is not this rule in favor of the equal claims of the descending line, in the same degree?*—375.

Yes. Without distinction of sex, and to the exclusion of

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claimants. Thus, if A dies, owning real estate, and for instance, two sons and a daughter, or, instead of children, leaves only two or more grandchildren, or two or more great-grandchildren, these persons being his lineal descendants, and all of equal degree of consanguinity to the common ancestor, that is, being all of them either his children, or grandchildren, or great-grandchildren, they will partake equally of the inheritance as tenants in common.

6. *When was this rule of descent prescribed by the statute of New York?*—375.

On the 23d of February, 1786; and it has been adopted by the New York Revised Statutes.

7. *To what extent does this rule prevail in the United States?*—375.

It prevails in all the United States, with this variation, that, in South Carolina, the widow takes one third of the estate in fee, and in Georgia, she takes a child's share in fee, if there be any children, and if none, she then takes a moiety of the estate. In Massachusetts, the statute law of descents applies only to estates whereof the ancestor died seised in fee simple or for the life of another, and the descent of estates tail (which are left as they stood at common law) is limited to the eldest male heir. In Rhode Island, New Jersey, North and South Carolina, Tennessee and Louisiana, the claimants take, in all cases, *per stirpes*, though standing in the same degree. In Alabama, the descendants of children also take *per stirpes*, and in Tennessee the male issue is preferred to the female in the descent of real property.

8. *Did not the rule of common law, under the statute of descents, that* seisina facit stipitem, *formerly exist in New York?*—388, 389.

Yes, until 1786; and the heir was to deduce his title from the person dying seised. But the New York Revised Statutes have wisely altered the preëxisting law on this subject; and they have extended the title by descent generally to all the real estate owned by the ancestor at his death; and they include in the descent every interest, legal and equitable, in lands, tenements, and hereditaments, either seised or possessed by the intestate, or to which he was in any manner entitled, with the ex-

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ception of leases for years, and estates for the life of another person. The Massachusetts, Virginia, North Carolina, and the Tennessee law of descent reaches equally to every interest in fee in real estate. The Massachusetts statute extends to every such interest for the life of another, and the North Carolina and Tennessee statutes to every right, title or interest in the estate. This completely abolishes the English maxim, that *seisina facit stipitem*. So, likewise, in Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, and Ohio, and probably in other States, the real and personal estates of intestates are distributed among the heirs, without any reference or regard to the actual seisin of the ancestor. Reversions and remainders, vested by descent in an intestate, pass to his heirs in like manner as if he had been seised in possession; and no distinction is admitted in descents between estates in possession, and in reversion. In the States of Maryland and North Carolina, the doctrine of *possessio fratris* would seem still to exist.

9. *In case of posthumous descendants, to whom does the inheritance in the meantime descend, at the death of the intestate?*—389.

To the heir *in esse*. It was declared, by Lord Chief Justice De Grey, in the case of *Goodtitle* v. *Newman*, on the authority of a case in the Year Books, of 9 Hen. VI. 25, a., that the posthumous heir was not entitled to the profits of the estate before his birth, because the entry of the presumptive heir was lawful. This rule does not apply to posthumous children who take remainders, under the statute of 10 and 11 William III. They must take the intermediate profits, says Lord Hardwicke; for they are to take in the same manner as if born in the lifetime of the father. This construction of Lord Hardwicke applies to the New York Revised Statutes; for it is declared, that posthumous descendants shall, in all cases, inherit in the same manner as if born in the lifetime of the intestate. The provision in the laws of some of the other States, such as Rhode Island, New Jersey, Pennsylvania and Missouri, would seem to be to the same effect, and to admit of the same construction.

10. *What is the second rule of descents?*—390.

That if a person dying seised, or as owner of land, leaves

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lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren, and their descendants, shall inherit only such share as their parents respectively would have inherited if living.

11. *Does this rule prevail in New York?*—390.

Yes; it is so declared in the Revised Statutes, and it is probably to be found in the laws of every State in the Union.

12. *What is the third canon of inheritance?*—393.

That if the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father and next to the mother, or jointly, under certain qualifications.

13. *What is the fourth rule of inheritance?*—400, 401.

That if the intestate dies without issue, or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters, or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living. The rule applies to other direct lineal descendants of brothers and sisters, and the taking *per capita* when they stand in equal degree, and taking *per stirpes* when they stand in different degrees of consanguinity to the common ancestor, prevails as to collaterals, to the remotest degree, equally as in the descent to lineal heirs.

14. *What is the fifth?*—407.

That in default of lineal descendants, and parents, and brothers and sisters, and their descendants, the inheritance as-

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cends to the grandparents of the intestate, or to the survivor of them. This is not the rule that has recently been declared in New York, for that excludes, in all cases, the grandparents from the succession, and the direct lineal ascending line stops with the father.

15. *What is the sixth ?*—408, 409.

That, in default of lineal descendants, and parents, and brothers and sisters, and their descendants, and grandparents, the inheritance goes to the brothers and sisters, equally, of both the parents of the intestate, and to their descendants. If all stand in equal degree of consanguinity to the intestate, they take *per capita;* and if in unequal degree, they take *per stirpes.*

This is the rule declared in New York, with the exception of the grandparents ; and it is presumed it may be considered, with some slight variations in particular instances, as a general rule throughout the United States. It is confined, in New York, to cases in which the inheritance had not come to the intestate on the part of either of his parents. The rule is controlled in that, and in some other States, by the seventh rule.

16. *What is the seventh ?*—409.

That, if the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father, and their descendants, shall have preference, and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference ; and, in default of them, the brothers and sisters on the father's side, and their descendants, take. This rule is so declared in the New York Revised Statutes.

17. *What is the eighth rule ?*—409.

That on failure of heirs, under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different States, as to the half blood, and as to the ancestral estates, and as to the equality of distribution. This rule is

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of very prevalent application in the several States, but there are some peculiarities in the local laws of descent which modify it in some of the States.

18. *Does this last rule prevail in New York?*—410.

No; for in New York, in all cases not within the seven preceding rules, the inheritance descends according to the course of common law.

LECTURE LXVI.

B.XV.2. B.XVIII.2.

OF TITLE BY ESCHEAT, BY FORFEITURE, AND BY EXECUTION.

1. *Under what heads is title to land usually distributed?*—423.

Under the heads of descent and purchase, the one title being acquired by operation of law, and the other by the act or agreement of the party. But titles by escheat and forfeiture are also acquired by the mere act of the law; and Mr. Hargrave thinks that the proper general division of title to estates would have been by purchase, and by act of law, the latter including equally descent, escheat, and forfeiture.

2. *What additional title, unknown to the English common law, is added by American authors?*—423.

Title by execution.

3. *How was title by escheat created in the English law?*—423, 424.

It was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats, under the English law, are declared to be strictly feudal, and to import the extinc-

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tion of tenure. But, as feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the State steps in in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

4. *To what, under the New York Revised Statutes, are lands, escheated to the State, held subject?*—425.

To the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended.

5. *Is not forfeiture, at common law, of the estate for crimes very much reduced in this country?*—426, 427.

Yes; and the corruption of blood is universally abolished. In New York, forfeiture of property for crimes is confined to the case of a conviction for treason; and, by a law of the colony of Massachusetts, as early as 1641, escheats and forfeitures, upon the death of the ancestor, "natural, unnatural, casual, or judicial," were abolished for ever.

6. *What is the rule of law as to the title which the State takes by escheat or forfeiture?*—427.

It takes the title which the party had, and none other. It is taken in the plight and extent by which he held it; and the estate of a remainderman is not destroyed or divested by the forfeiture of the particular estate.

7. *Was title by execution known to the common law?*—428.

It was not; it owes its introduction to modern statutes.

8. *When, as a general rule, is land to be sold on execution?*—430.

The general regulation, and one prevalent in most of the States, is to require the creditor to resort, in the first instance, to the personal estate, as the proper and primary fund, and to look only to the real estate after the personal estate shall have been exhausted and found insufficient.

9. *How, under the New York Revised Statutes, is the sale to be made?*—431.

It is now provided by the New York Revised Statutes that

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the real estate of the debtor may be sold on execution, either at law or in chancery, in default of goods and chattels, on six weeks' notice, and in separate parcels, if required by the owner. A certificate of the sale is to be delivered by the officer to the purchaser, and another certificate filed in the clerk's office of the county within ten days.

10. *Is a sale so made conditional or absolute?*—431, 432.

Conditional; redemption of the lands sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent. interest. Any joint tenant, or tenant in common, may redeem his ratable share of the land by paying a due proportion of the purchase money. On default of the debtor, any creditor, by judgment at law, or decree in equity, and in his own right, or as a trustee, within three months after the expiration of the year, may redeem the land, on paying the purchase money, with seven per cent. interest. So, any other judgment creditor may redeem from such prior creditor. The redemption is allowed to be carried further, and is given to any other creditor, who may redeem from the creditor standing prior to him. But all these subsequent redemptions must be made within fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title then acquired becomes absolute in law.

LECTURE LXVII.

[illegible] XX. XXI. XXIII.

OF TITLE BY DEED.

1. *What is a purchase, in the ordinary and popular acceptation of the term?*—440.

It is the transmission of property from one person to another, by their voluntary act and agreement founded on a valuable consideration.

2. *What is it in judgment of law?*—440.

It is the acquisition of land by any lawful act of the party,

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in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.

3. *Were lands alienable in the time of the Anglo-Saxons?*—441.

They were; either by deed or by will, according to some authorities.

4. *How were they called when conveyed by charter or deed?*—441, 442.

Boc, or bookland, and the other kind of land, called folcland, was held and conveyed without writing. But this notion of the free disposition of land among the Saxons must be understood in a very qualified sense; and the *jus disponendi*, even at that day, was subject, as it is and ought to be in every country and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions. It was reserved, however, to the feudal policy, to impose restraints upon the enjoyment and circulation of landed property to an extent then unprecedented in the annals of Europe.

5. *In whose favor did these restraints arise?*—442.

They arose partly in favor of the heir of the tenant; but principally from favor to the lord of the fee. It was repugnant to the genius of the feudal system to allow the land which the chieftain had given to one family, to pass without his consent into the possession of another, and perhaps to an enemy. The restrictions accorded with the doctrine of feuds; but were proper for that system only. As a part of the feudal fabric, they fell before the influence of freedom, commerce, and the arts.

6. *When were the earliest innovations upon feudal restraints made?*—443.

In the reign of Henry I.; the first step taken in mitigation of the rigor of the law of feuds, and in favor of voluntary alienations, was the countenance given to the practice of subinfeudations.

7. *Did not a law of Henry I. relax the restraints as to purchased lands?*—444, 445.

Yes, but retained them as to those which were ancestral.

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Under the statute *de donis* of 13 Edward I., fees conditional were changed into estates tail; and by construction of the courts, these were eluded, and the policy of the statute defeated by the fiction of a common recovery. The statute of *quia emptores*, 18 Edward I., permanently established the free right of alienation by the sub-vassal, without the lord's consent. The power of involuntary alienation, by rendering the land answerable by attachment for debt, was created by the statute of 13 Edward I., chapter 18, which granted the *elegit;* and by the statutes merchant or staple, of 13 Edward I., and 27 Edward III., which gave the *extent.*

8. *Who is capable of holding land by descent, devise, or purchase?*—446.

Every citizen of the United States; and every person capable of holding lands, except idiots, persons of unsound minds, and infants, and seised of, or entitled to, any estate, or interest in land, may alien the same at his pleasure, under the regulations prescribed by law.

9. *Has not the statute of* 32 *Henry VIII., respecting pretended titles, which imposed a forfeiture upon the seller of the whole value of lands sold, and the same penalty upon the buyer also, if he purchased knowingly, been reënacted in the State of New York?*—447.

Yes. This severe statute was reënacted literally in New York, in 1788, but the penal provisions are altered by the New York Revised Statutes, which have abolished the forfeiture, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding.

10. *Does this provision apply to a mortgage of the lands?*—447.

No: nor to a release of the same to the person in lawful possession.

11. *Was not a feoffment void, without livery of seisin?*—448.

Yes: and without possession a man could not make livery of seisin.

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12. *Is this principle peculiar to the common law?*—448.

No. It was a fundamental doctrine of the law of feuds, on the continent of Europe.

13. *Does the principle prevail generally in the United States?*—448, 449.

The doctrine, that a conveyance by a party out of possession and with an adverse possession against him, is void, prevails equally in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Mississippi, Alabama, Indiana, and probably in most of the other States. In some States, such as New Hampshire, Pennsylvania, Ohio, Illinois, Missouri, and Louisiana, the doctrine does not exist; and a conveyance by a disseisee would seem to be good, and pass to the third person all his right of possession, and of property, whatever it might be.

14. *What is required, in the due execution of a deed?*—450.

It must be written on paper or parchment and signed, sealed and delivered.

15. *Does not the law require more form and solemnity, in the conveyance of land, than in that of chattels?*—450.

It does; and this arises from the greater dignity of the freehold in the eye of the ancient law, and from the light and transitory nature of personal property, which enters much more deeply into commerce, and requires the utmost facility in its incessant circulation.

16. *How were lands conveyed in the early periods of English history?*—450.

Usually without writing, but it was accompanied with overt acts, equivalent, in point of formality and certainty, to deeds. As knowledge increased, conveyance by writing became more prevalent; and finally, by the statute of frauds and perjuries, of 29 Charles II., all estates and interests in lands (except leases not exceeding three years), created, granted, or assigned, by livery and seisin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force or effect than estates at will only.

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17. *How has this statute provision been received in the United States?*—450.

It has been either expressly adopted, or assumed as law, throughout the United States. In New York, it has been enacted, in every successive revision of the statutes; and in the last revision it is made to apply, not only to every estate and interest in lands, but to every power, or trust, concerning the same; and the exception as to leases is confined to leases for a term not exceeding one year.

18. *Does this provision apply to trusts by implication, or operation of law, under the New York Revised Statutes?*—450, 451, *n.* (*c.*)

No: nor is a parol promise to pay for the improvements made upon land within the statute of frauds. They are not an interest in land, but only another name for work and labor bestowed upon it. So a crop of growing potatoes, corn, or other annual production, raised by the industry of man, is a personal chattel, and not within the statute.

19. *How must a conveyance be executed in England?*—451.

It is deemed essential in the English law to a conveyance of land, that it should be by writing, sealed and delivered; this rule of the common law is adopted and followed with us, except in Louisiana, and is in some States made a statute provision. Part performance of an agreement by parol to sell land will, in certain cases, take the agreement out of the statute of frauds, and authorize a court of equity to decree a specific performance of the contract.

20. *What is a deed?*—452.

A deed is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered.

21. *What did the common law intend by a seal?*—452.

An impression upon wax, or wafer, or some other tenacious substance capable of being impressed.

22. *Is sealing, in the common law sense of the term, requisite in every State of the Union?*—452, 453, *and notes.*

Not in all of them. In Connecticut, by statute of 1838, a

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seal is not necessary to the conveyances of real estate, or bonds. In many of the southern and western States, a scroll is a valid substitute for a seal. In New England generally, and in New York, the seal retains its original definition and character.

23. *Is delivery of a deed essential?*—454.

It is, for it takes effect only from the delivery.

24. *To whom may the deed be delivered?*—454.

It may be delivered to the party himself to whom it is made, or to any other person authorized by him to receive it.

25. *May it be delivered to a stranger as an* escrow?—451.

It may; and this means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the *grantee.*

26. *When generally does an* escrow *take effect?*—454.

Generally from the second delivery, and it is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery.

27. *What is the general principle of law on this subject?*—454.

That in all cases where it becomes necessary, for the purposes of justice, that the true time when any legal proceeding took place should be ascertained, the fiction of law introduced for the sake of justice, is not to prevail against the fact. It has been further held that if the grantor deliver a deed as his deed, to a third person, to be delivered over to the grantee on some future event, as on the arrival of the grantee at York, it is a valid deed from the beginning, and the third person is but a trustee of it for the grantee.

28. *What is required to make a deed valid against* bona fide *purchasers?*—456.

By the statute law of every State in the Union, all deeds

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and conveyances of land; except certain chattel interests, are required to be recorded, upon previous acknowledgment or proof.

29. *Against whom only will a deed be good if not recorded?*—456.

Only as against the grantor and his heirs. It is void as against subsequent *bona fide* purchasers for a valuable consideration, whose deeds shall be first recorded.

30. *What effect has* notice *of a prior unrecorded deed?*—456.

The English law prevails generally in this country, that notice of the deed by a subsequent purchaser, previous to his purchase, will countervail the effect of the registry, and destroy his pretensions as a *bona fide* purchaser.

31. *Do not the New York Revised Statutes contain specific directions on the subject of the proof of execution of deeds?*—458.

They do; and also of the manner of recording conveyances of real estate.

32. *Do the New York Revised Statutes make any provision as to the number of witnesses requisite to a deed?*—458.

None whatever; and consequently the common law rule applies, that one witness is sufficient, or the acknowledgment before the officer without any witness.

33. *Is the practice of recording deeds in England limited, or general?*—459.

It is of local and very limited application. It applies to the Bedford level tract, to the ridings of Yorkshire, and to the county of Middlesex.

34. *Was there not, during the period of the English commonwealth, an effort to establish county registers for recording deeds throughout England?*—459.

There was.

35. *Was not the ancient policy in favor of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant?*—459.

Yes; but the ingenuity of conveyancers, and the general and

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natural dispositions to withdraw settlements, and the domestic arrangements, from the idle curiosity of the public, have defeated that policy.

36. *How is it now in Scotland?*—459.

The old feudal forms, and the *sasine*, or symbolical tradition of the land, are retained.

37. *Of what does a deed consist?*—460.

It consists of the names of the parties, the consideration for which the land was sold, the description of the subject granted, the quantity of interest conveyed, and, lastly, the conditions, reservations, and covenants, if any there be.

38. *What said Sir Henry Spelman of the deeds of the Saxons?* 460.

He says that they "observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, and the names of the witnesses." This brevity and perspicuity, so much commended by Spelman, have become quite lost, or are but dimly perceived, in the cumbersome forms and precedents of the English system of conveyancing.

39. *Do not the forms in New York, and in those parts of the United States which adhere the most to the English practice, still retain the language of a mutual contract, executed by both parties?*—460, 461.

Yes. And each of them is supposed by the fiction implied in the more formal parts of the *indenture*, to retain a copy. But the essential parts of a conveyance of land in fee are brief, and require but few words. If a deed of feoffment, according to Lord Coke, be without *premises*, *habendum*, *tenendum*, *reddendum*, clause of warranty, etc., it is still a good deed, if it gives lands to another, and to his heirs, without saying more, provided it be sealed and delivered, and be accompanied with livery.

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40. *What is the usual form of conveyance in the United States?*—461.

It is usually by bargain and sale, and possession passes *ex vi facti.*

41. *What is requisite as to the parties?*—462.

The parties must be competent to contract, and truly and sufficiently described.

42. *How has a grant to the people of a county been held?*—462.

To be void; because the statute, enabling supervisors of counties to take conveyances of land, applied only to conveyances made to them by their official name.

43. *Is a grant to the inhabitants of a town not incorporated, valid?*—462.

It is not.

44. *Are not conveyances good in many cases when made to a grantee by a certain designation, without the mention of either the Christian or surname?*—462.

Yes. As to the wife of I S, or to his eldest son, for *id est certum, quod potest reddi certum.*

45. *Is a consideration essential to a good and absolute deed?*—462.

It is generally so held; but a gift, or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.

46. *Must the consideration be either good or valuable?*—464.

Yes. And not partaking of any thing immoral or illegal, or fraudulent.

47. *Is it not a universal rule that it is unlawful to contract to do that which it is unlawful to do?*—464.

Yes. And every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se*, or only *malum prohibitum.*

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48. *What is a good consideration founded upon?*—464.

Upon natural love and affection between near relations by blood; but a valuable one is founded on something deemed valuable, as money, goods, services, or marriage.

49. *What is the rule respecting the description of the land conveyed?*—466.

The rule is, that known and fixed monuments control courses and distances. So, the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description must yield to those which are the most certain and material.

50. *Does the mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specification, amount to any covenant?*—466.

It does not; it is but matter of description—nor does it afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount.

51. *Whenever it appears by the definite boundaries, or by words of qualification, as, "more or less," or as, "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, how does the buyer take it?*—467.

He takes it at the risk of the quantity, if there be no intermixture of fraud in the case.

52. *What is the difference between a* reservation *and an* exception?—468.

A reservation is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not in *esse* before; but an exception is always part of the thing granted, or out of the general words and description in the grant.

53. *How was the* habendum *originally used?*—468.

To determine the interest granted, or to lessen, enlarge, ex-

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plain, or qualify the premises. It is now generally considered but a mere form. If, however, the premises should be merely descriptive, and no estate be mentioned, then the *habendum* becomes efficient to declare the intention; and it will rebut any implication arising from the silence of the premises.

54. *What five covenants are usually inserted in a conveyance of the fee?*—471.

1. That the grantor is lawfully seised.
2. That he has good right to convey.
3. That the land is free from incumbrances.
4. That the grantee shall quietly enjoy.
5. That the grantor will warrant and defend the title against all lawful claims.

55. *Which three are personal covenants?*—471.

The first three of the five above named. Those three do not run with the land, nor pass to the assignee.

56. *Are the covenant of warranty, and the covenant for quiet enjoyment, in the nature of real covenants?*—471.

Yes; and they run with the land conveyed, and descend to heirs, and vest in assignees, or the purchaser.

57. *Are there not implied as well as express covenants?*—473, 474.

Yes; any disturbance in the enjoyment of property, contrary to the grant of the party creating the disturbance, is a breach of covenant. In Pennsylvania, Delaware, Illinois, Indiana, Missouri, and Mississippi, it is declared by statute that the words *grant, bargain and sell*, in conveyances in fee, shall, unless specially restrained, amount to a covenant that the grantor was seised of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment. But these words do not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. The New York Revised Statutes enact that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. In North Carolina and Alabama,

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the words "give, grant, bargain, sell," etc., do not imply any warranty of title; and this is the conclusion which sound policy would dictate.

58. *How many kinds of conveyances are there?*—480.

There are two kinds; first, conveyances at common law; second, conveyances under the statute of uses.

59. *How is the first class subdivided?*—480.

Into original and derivative conveyances.

60. *What was a feoffment?*—480.

It was the mode of conveyance in the earliest periods of the common law.

61. *With what was the feoffment accompanied?*—480.

With actual delivery of possession of the land, termed livery of seisin.

62. *How was livery of seisin performed?*—480, 481.

It was performed by the entry of the feoffor upon the land, with the charter of feoffment, and delivering a clod, turf, or twig, or the latch of the door, in the name of seisin of all the lands contained in the deed. The ceremony was performed in the presence of the peers or freeholders of the neighborhood, who were the vassals, of the feudal lord, and who might afterwards be called on to attest the certainty of the livery of seisin.

63. *Did the feoffment operate upon the possession?*—481.

Yes; without any regard to the estate or interest of the feoffor.

64. *Has not the conveyance by feoffment, with livery of seisin, long since been obsolete in England?*—489, 490, *n.* (c.)

Yes; and though it has been, in this country, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the statute of uses, or short deeds of conveyance, in the nature of the ancient feoffment, and made effectual, on being duly recorded, without the ceremony of livery. The New York Revised Statutes have expressly abolished the

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mode of conveying lands by feoffment, with livery of seisin, and in Illinois and Missouri, a feoffment, deed, or conveyance in writing, passes the estate without livery of seisin. In South Carolina, feoffment, with livery of seisin, is still a valid and subsisting mode of conveyance. So, in Connecticut, feoffment, without livery.

65. *What was a grant?*—490.

It was a common law conveyance, and applied to incorporeal hereditaments, such as reversions, rents, and services; which, not being of a tangible nature, and existing only in contemplation of law, could not be conveyed by livery of seisin. Such rights were said to lie in grant, and not in livery, and they were conveyed simply by deed.

66. *What was the difference between a feoffment and a grant?*—490.

There was this essential difference between a feoffment and a grant: while the former carried destruction in its course, by operating upon the possession, without any regard to the estate or interest of the feoffor, the latter benignly operated only upon the estate or interest which the grantor had in the thing granted, and could lawfully convey.

67. *What did the common law require, to render the grant effectual?*—490, 491.

It required the consent of the tenant of the land out of which the rent, or other incorporeal interest, proceeded; and this consent was called attornment; but this is now abolished in the United States.

68. *Have not the New York Revised Statutes rendered the attornment of the tenant unnecessary to the validity of a conveyance by his landlord?*—491.

Yes. But to render him responsible to the grantee, for rent or otherwise, he must have notice of the grant. Nor will the attornment of a tenant to a stranger be valid, unless made with his landlord's consent, or in consequence of a judgment or decree, or to a mortgagee, after forfeiture of the mortgage.

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69. *Have not the New York Revised Statutes given to deeds of conveyance of the inheritance or freehold, the name of grants?*—491.

Yes. And though deeds of bargain and sale, and of lease or release, may continue to be used, they are to be deemed grants.

70. *What is the nature and effect of a covenant to stand seised to uses?*—492.

By this conveyance, a person seised of lands covenants that he will stand seised of them to the use of another. On executing the covenant, the other party becomes seised of the use of the land, according to the terms of the use; and the statute of uses immediately operates, and annexes the possession to the use.

71. *Can any use be raised for any purpose by this conveyance, in favor of a person not within the influence of a domestic consideration?*—493.

No. And it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account, or as a mere trustee for some of the family connections. He is equally incompetent to take.

72. *Does this mode of conveyance exist in England?*—493.

It is said to be no longer in use there. It owes its efficacy to the statute of uses; and in New York the statute of uses is abolished, and no mention is made of this conveyance.

73. *What is a general rule as regards the form of conveyances?*—493.

It is a principle of law, that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character so as to give it effect. *Cum quod ago non valet ut ago, valeat quantum valere potest.*

74. *Is there not a qualification to this rule?*—493, 496.

Yes; the instrument must partake of the essential qualities of the deed assumed. And, therefore, no instrument can operate as a feoffment without livery, either shown or presumed; nor

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as a grant, unless the subject lies in grant (as it now does in New York in all cases of the freehold); nor as a covenant to stand seised, without the consideration of blood or marriage; nor as a bargain and sale, without a valuable consideration.

75. *What is the usual mode of conveyance in England?*—494.

That of lease and release; because it does not require the trouble of enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery, or attornment. It was the mode universally in practice in New York until the year 1788.

76. *What mode of conveyance is most prevalent in the United States?*—495.

That of bargain and sale; and it was in universal use in New York prior to the introduction of the grant by the Revised Statutes, in January, 1830.

77. *What, originally, was a bargain and sale?*—495, 496.

It was originally a contract for the conveyance of land for a valuable consideration; and though the land itself would not pass without livery, the contract was sufficient to raise a use, which the bargainor was bound in equity to perform. Nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale. After the statute of uses was passed, the use which was raised and vested in the bargainee, by means of the bargain, was annexed to the possession; and by that operation the bargain became at once a sale, and complete transfer of the title.

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LECTURE LXVIII.

OF TITLE BY WILL OR DEVISE

1. *What is a will?*—501.

A will is a disposition of real and personal property, to take effect after the death of the testator. When the will operates upon personal property, it is sometimes called a testament; and when upon real estate a devise; but the more general and the more popular denomination of the instrument, embracing equally real and personal estates, is that of last will and testament.

2. *Were lands devisable with the Anglo-Saxons?*—503.

It seems that they were, to a qualified extent. But upon the establishment of the feudal system, at the Norman conquest, lands held in tenure ceased to be devisable.

3. *What exceptions were there to this restraint?*—504.

Burgage tenures, and lands in gavelkind.

4. *When did the disposition of real property by will become absolute?*—504.

In the beginning of the reign of Charles II.

5. *Was not the English law of devise imported into this country by our ancestors?*—504, 505.

Yes; and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient. Lands may be devised by will in all the United States; and the statute regulations on the subject are substantially the same, and they have been taken from the English statutes of 32 Henry VIII., and 29 Charles II.

6. *What is the general rule as to the parties to a devise?*—505, 506.

That all persons of sound mind are competent to devise real estate, with the exception of infants and married women. A *feme covert* may devise, by way of the execution of a power; but

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the will that she makes in such a case, must be executed with the same solemnities as if she had executed the will while sole; and the statute of New York excludes the exercise of such power by her during infancy.

7. *May testaments of chattels be made by infants?*—506.

They might at common law be made by infants of the age of fourteen, if males, and twelve, if females.

8. *Are the laws in the several States uniform on this point?*—506.

They are not; and by the New York Revised Statutes, the age to make a will of personal estate is raised up to eighteen in males, and sixteen in females; nor can a married woman make a testament of chattels, any more than of lands, except under a power or marriage contract.

9. *May infants*, femes covert, *and persons of nonsane memory, and aliens be devisees?*—506.

Yes; for the devise is without consideration. A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent, if the particular devise to him was omitted out of the will.

10. *Which, in this case, has the precedence, title by descent, or by devise?*—506.

Title by descent.

11. *If the land be devised to the heir charged with debts, by what will he take, and why?*—507.

By descent; for the charge does not operate as an alteration of the estate.

12. *Are not corporations excepted out of the English statute of wills?*—507.

Yes; corporations are excepted out of the English statute of wills, and the object of the law was to prevent property from being locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of merit or duty, to give away their estates from their families.

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13. *What do the New York Revised Statutes provide on this subject?*—507.

That no devise to a corporation shall be valid, unless the corporation be expressly authorized to take by devise.

14. *Are witnesses to a will rendered incapable of taking any beneficial interest under it?*—508.

Yes, except they be creditors, whose debts by the will are made a charge on the real estate. C. C. 1282-53.

15. *What is the settled rule of the English law respecting things devisable?*—510.

That the testator must be seised of the lands devised at the time of making the will. He must have a legal or equitable title in the land devised. The devise is in the nature of a conveyance, or an appointment of a particular estate; and therefore lands, purchased after the execution of the will, do not pass by it; the testator must likewise continue seised at the time of his death.

16. *Have not the New York Revised Statutes made devises prospective?*—512.

Yes, by declaring that every estate and interest descendible to heirs may be devised; and that every will made in express terms, of all the real estate, or in any other terms denoting the testator's intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. The law in Massachusetts, Vermont, Pennsylvania and Virginia is the same as that now in New York. In Virginia seisin is not requisite to a devise, and a right of entry is devisable. Rights of entry are devisable even though there be an adverse possession or disseisin; and the last will will extend prospectively, and carry all the testator's lands existing at his death, if so evidently intended. This is also understood to be the law in Maine, Alabama, Connecticut, North Carolina, Illinois and Ohio; and in the latter State the statute declares that every description of property may be devised.

17. *Has a joint tenant an interest which is devisable?*—513.

He has not; the reason given by Lord Coke is, that the

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surviving joint tenant has an interest, which first attaches at the death of the joint tenant making the will; and he insists that there is a priority of time in an instant; and Mr. Butler refers to another case in which that subtlety was applied. A better reason is that the old law favored joint tenancy; and the survivor claims under the feoffor, which is a title paramount to that of the devisee; and a devisee is not permitted to sever the joint tenancy.

18. *What, in general, are the formalities required in the execution of a will of real estate?*—513.

The general provision on this subject is, that the will of real estate must be in writing, and subscribed by the testator, or acknowleded by him in the presence of at least two witnesses, who are to subscribe their names as witnesses. The regulations in the several States differ in some unessential points; but generally they have adopted the directions given by the English statute of frauds, of 29 Charles II.

19. *What is the general doctrine of international law regarding the execution of wills?*—513.

That wills concerning land must be executed according to the prescribed formalities of the State in which the land is situated; but wills of chattels, executed according to the laws of the place of the testator's domicil, will pass personal property in all other countries, though not executed according to their laws. The *status*, or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicil. *Mobilia personam sequuntur, immobilia situm.*

20. *How are wills to be executed in New York?*—514.

By the New York Revised Statutes, the testator is to subscribe the will at the end of it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under the penalty of fifty dollars; but the omission of their residence will not affect the validity and efficiency of their attestation. Three witnesses, as in the statute of frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South

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Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by witnesses, proof of it may be made by others.

21. *Does not the English statute of frauds require the will to be signed by the devisor, and to be attested and subscribed by the witnesses, in his presence?*—514.

Yes; and this direction has been extensively followed in the statute laws of this country.

22. *To what extent have the Revised Statutes altered the former law of New York?*—515.

So far as to require the signature of the testator, and of the witnesses, to be at the end of the will; and the testator, when he signs or acknowledges the will, is to declare the instrument to be his last will, and he is to subscribe or acknowledge the will in the presence of each witness; and the witnesses are to subscribe their names at the request of the testator.

23. *Have not the English courts, from a disposition to favor wills, departed from the strict construction and obvious meaning of the statute of frauds?*—515.

They have, and thereby opened a door to very extensive litigation. It was held to be sufficient, that the testator wrote his name at the top of the will, by way of recital; and his name, so inserted, was deemed signing the will within the purview of the statute.

24. *Has not the doctrine of a constructive presence of the testator been carried very far?*—515.

Yes: and it has been decided that if the witnesses were within view, and where the testator might, or had the capacity to see them, with some little effort, if he had the desire, though in reality he did not, they were to be deemed subscribing witnesses in his presence.

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25. *Has it not been further held, that if the testator produced to the witnesses a will already signed, and acknowledged the signature in their presence, it was a sufficient compliance with the statute?*—515.

Yes.

26. *Is it held necessary that the witnesses should attest in the presence of each other?*—516.

It is not, nor is it necessary they should attest every page or sheet, or that they should know the contents.

27. *Must the subscribing witnesses all attest at one time?*—516.

It is not requisite.

28. *Was a will of chattels good without writing, at common law?*—516, 517.

It appears it was. In ignorant ages, there was no other way of making a will but by words or signs. But, by the time of Henry VIII., and especially in the ages of Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that verbal, unwritten, or nuncupative wills, were confined to extreme cases, and held to be justified only upon the plea of necessity.

29. *What have the New York Revised Statutes declared respecting nuncupative or unwritten wills?*—517.

They have declared that no nuncupative or unwritten will shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea; and every will of real or personal property must be equally subscribed by the testator, or acknowledged by him in the presence of at least two attesting witnesses.

30. *What is required in the English ecclesiastical courts, respecting a nuncupative will?*—518.

That it be proved by evidence more strict and stringent than that applicable to a written will, even in addition to all the requisites prescribed by the statute of frauds.

31. *How are the laws of Louisiana in respect to last wills?*—519.

Wills, under the code of that State, are of three kinds;

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nuncupative or open, mystic or sealed, and olographic. They are all to be in writing. The first, or nuncupative testament, is to be made by a public act before a notary, in the presence of three, or five witnesses, according to circumstances; and to be read to the testator, and signed by the testator and witnesses; or it may be executed by his private signature, in the presence of three, or five, or seven witnesses, according to circumstances, and they are to subscribe it. The second, or mystic testament, is to be signed by the testator, and sealed up, and presented to a notary and seven witnesses, with a declaration that it is his will; and the notary and witnesses are to subscribe the superscription. The third, or olographic testament, is one entirely written, and signed by the testator, and subject to no other form, and may be made out of the State.

32. *Is not a will, duly made according to law, in its nature ambulatory during the testator's life, and revocable at his pleasure?*—520.

Yes. But to prevent the admission of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument executed in the same manner; or else by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions.

33. *May not a will be revoked by implication, or inference of law?*—521.

Yes. And these revocations are not within the purview of the statute; and they have given rise to some of the most difficult and interesting discussions existing on the subject of wills. They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. The case stated by Cicero is often alluded to, in which the father, on the report of the death of his son, who was then abroad, altered his testament, and appointed another person to be his heir. The son returned after the father's death, and the *centumviri* restored the inheritance to him. There is a case mentioned in the Pandects to the same effect; and it was the general doctrine of the Roman law, that the subsequent birth of a child, unnoticed in the will, annulled it. This is the

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rule in those countries which have generally adopted the civil law, *Testamenta rumpiuntur agnatione posthumi;* and there is not perhaps, any code of civilized jurisprudence, in which this doctrine of implied revocation does not exist and apply, when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator.

34. *What is the English rule on this question?*—521, 522.

It is a settled rule of the English law, that marriage and the birth of a child, subsequent to the execution of the will, are a revocation in law of a will of real as well as of personal estate, provided the wife and child were wholly unprovided for, and there was an entire disposition of the whole estate to their exclusion.

35. *Can the implied revocation be rebutted by parol evidence?*—523.

The question was considered in New York, and it was adjudged* that such presumptive revocation might be rebutted by circumstances. The better opinion is, that under the English law there must be a concurrence of a subsequent marriage and a subsequent child, to work a revocation of the will; and that the mere subsequent birth of children, unaccompanied by other circumstances, would not amount to a presumed revocation.

36. *Can a testator devise all his estate to strangers, and disinherit his children?*—524, 525.

There is no doubt of it. This is the English law, and the law in all the States, with the exception of Louisiana. Children are deemed to have sufficient security in the affection of parents, that this unlimited power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir may take it, notwithstanding the testator may have clearly declared his intention to disinherit him.

37. *How is a will affected by the birth of a posthumous child?*—525, 526, *and notes.*

By the statute law of the States of Maine, Vermont, New

* *Brush* v. *Wilkins*, 4 Johns. Ch. Rep., 506.

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Hampshire, Massachusetts, Connecticut, New York, New Jersey, Ohio and Alabama, a posthumous child, and, in all those States except Alabama, children born after the making of the will and in the lifetime of the father, inherit as if he had died intestate, unless some provision be made for them in the will, or otherwise, or they be particularly noticed in the will. In Pennsylvania and Delaware, marriage, or an after-child not provided for, is a revocation *pro tanto* only. In Indiana, Illinois and Connecticut, the birth of a child avoids the will *in toto*. The law in Maine, New Hampshire, Massachusetts and Rhode Island, implies the same relief to all children, and their representatives, who have no provision made for them by will, and who have not had their advancement in their parents' lifetime, unless the omission in the will should appear to have been intentional. In South Carolina, the interference with the will applies to posthumous children; and marriage and a child revoke the will. In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried or an infant; if he had children before, after-born children, unprovided for, work a revocation *pro tanto;* and in Virginia, marriage revokes a will, unless made under certain powers of appointment.

38. *What, if a devisee or legatee dies in the lifetime of the testator?*—526.

In Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland, and probably in other States, the lineal descendants of a devisee or legatee so dying are entitled to his share, unless the will provides otherwise. This is confined in Connecticut to a child or grandchild; in Massachusetts, Rhode Island and Maine, to them, or their relatives, and in New York, to children or other descendants. In Maryland, the will takes effect as if the deceased devisee or legatee had survived the testator. CC 1310

39. *What is provided by the New York Revised Statutes regarding presumptive revocation of wills?*—527.

If the will disposes of the whole estate, and the testator afterward marries and has issue born in his lifetime or after his death, and the wife or issue be living at his death, the will is deemed to

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be revoked; unless the issue be provided for by the will or by a settlement, or unless the will shows an intention not to make any provision.

40. *Is any other evidence to be received rebutting the presumption of revocation?*—527.

No; none other.

41. *Is the will of a* feme sole *revoked by her marriage?*—527.

It is; and this is an old and settled rule of law; and the reason of it is, that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control.

42. *Is a will deemed to be revoked by a second will?*—528.

Yes; provided it contains words of revocation, or makes a different disposition of the property, but not otherwise.

43. *Will a sale of the estate devised operate as a revocation?*—528.

It will; for the testator must die while owner of the land, or the will can not have effect upon it.

44. *Will a valid agreement or covenant to convey lands, which equity will specifically enforce, also operate in equity as a revocation of a previous devise of the same?*—528.

It will. It is as much a revocation of the will in equity, as a legal conveyance of the land would be in law; for the estate, from the time of the contract, is considered as the real estate of the vendee.

45. *What is a codicil?*—531.

A codicil is an addition, or supplement to a will, and must be executed with the same solemnity.

46. *What is the effect of canceling a will?*—531, 532.

If the first will be not actually canceled or expressly revoked on making a second, and the second will be afterward canceled, the first will is said to be revived. The mere act of canceling a will does not amount to any thing, unless it be done *animo revocandi*. The intention to revoke is an inference to be

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drawn from circumstances; cancelation is *prima facie* evidence of the intention; and the inference stands good until rebutted.

47. *What say the New York Revised Statutes respecting the destruction or revocation of a second will reviving the first?*—532, 533. C. C. 1297.

They have dispensed with all refinements on this point. In no case does the destruction or revocation of a second will revive the first, unless the intention to revive it be declared. They have also declared that no bond, agreement or covenant to convey property previously devised, nor any change or incumbrance upon the same, nor any conveyance altering but not wholly divesting the estate, shall be deemed a revocation of the will. But the property passes by the will, subject to any such agreement, change, or alteration, unless, in the instrument making the alteration, an intention thereby to revoke shall be declared. If, however, the provisions of the instrument making the alteration be wholly inconsistent with the previous will, the instrument operates as a revocation, unless its provisions depend on a condition which has failed.

48. *What is the first and great object of inquiry in the construction of a will?*—534.

The intention of the testator; and to this object technical rules are, to a certain extent, made subservient.

49. *Is the word* heirs *requisite to convey a fee?*—535.

It is not; but other words denoting an intention to pass the whole interest of the testator, as a devise of *all my estate, all my interest, all my property, my whole remainder, all I am worth or own, all my right and my title*, or, *all I shall die possessed of*, and many other expressions of the like import, will carry an inheritance, if there be nothing in the other parts of the will to limit or control the operation of the words.

50. *What is the effect of a devise without any words of limitation, or any thing more than a description of the land devised, and if there be nothing in the will from which a fee by implication may be inferred?*—537.

The devisee takes only an estate for life. This rule has

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been recognized both in England and with us, though it has been set aside in South Carolina, and probably other States, in favor of the intention, and in Massachusetts, in the case of a devise of wild lands.

51. *What is the present law in New York on this point?*—538.

The Revised Statutes have declared that every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied.

52. *What is the tendency of this provision?*—538.

Its tendency is to give increased certainty to the operation of a devise.

53. *What is the rule in most of the other States?*—539.

In most of the other States, the rules of the English law continue to govern.

54. *What is the general doctrine with respect to the expressions used by the devisor?*—540.

If his expressions denote only a *description of the estate*, as a devise of the house A, or the farm B, and no words of limitation be employed, then only an estate for life passes; but if the words denote the *quantity of interest* which the testator possesses, as all his estate in his house A, then a fee passes.

55. *What is another general rule on this point?*—540.

If the testator creates a charge upon the *devisee* personally, in respect of the estate devised, as if he devise lands to B, on condition of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser.

56. *Is there not a distinction if the charge be* upon the estate?—540.

Yes: if the charge is on the estate, and there are no words of limitation, or other words denoting an intention to pass the fee,

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but only a devise to A of the testator's lands, after the debts and legacies are paid, the devisee takes only an estate for life.

57. *Does this distinction prevail in New York?*—540.

It does not, since the enactment of the Revised Statutes.

58. *Does it not become necessary, in certain cases, that the devise be enlarged to a fee?*—540.

Yes: in every case in which the land is charged with a trust which can not be performed, or in which the will directs an act to be done which can not be accomplished, unless a greater estate than one for life be taken.

59. *Can introductory words to a will vary the construction, so as to enlarge the estate to a fee?*—541.

No: unless there be words in the will sufficient to carry such an interest. Introductory words to a will are like a preamble to a statute, to be used only as a key to disclose the testator's meaning.

60. *When are devises deemed lapsed?*—541.

As a general rule, all devises are deemed lapsed, if the devisee dies in the lifetime of the testator.

61. *Do not the English books take a distinction between a lapsed legacy of personal estate, and a lapsed devise of real estate?*—541.

Yes; the former falls into the residuary estate, and passes by the residuary clause, if any there be, and if not, passes to the next of kin; while the latter does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the heir at law.

62. *Is there not a distinction between a lapsed, and a void, devise?*—542.

Yes; the former case is where the devisee dies in the intermediate time between the making of the will and the death of the testator; but, in the latter case, the devise is void from the beginning, as if the devisee were dead when the will was made.

63. *Who takes the estate in such cases?*—542, *n.* (*b.*)

It is said that the heir takes in the case of a lapsed devise,

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but that the residuary devisee may take in the case of a void devise, if the terms of the residuary clause be sufficiently clear and comprehensive. In a recent New York case,* however, Chancellor Walworth concluded, that a residuary devise of all the testator's real estate not before disposed of by his will, did not embrace real estate which was in terms absolutely devised to others, although such real estate was not legally and effectually devised, either from the incapacity of the devisee to take real estate by devise, or by reason of his death in the lifetime of the testator. The weight of English and American authority would appear to be in favor of this conclusion, and that the heir at law takes in such a case, and not the residuary devisee. This decree was affirmed on appeal to the Court of Errors.

64. *What is the effect of the alteration of the law in New York?* —542.

The alteration of the law in New York, Virginia, and other States, making the devise operate upon all the real estate owned by the testator at his death, may produce the effect of destroying the application of some of the foregoing distinctions, and give greater consistency and harmony to the testamentary disposition of real and personal estates.

* See *Van Kleeck* v. *The Reformed Dutch Church*, 6 Paige, 600, and 29 Wendell, 457

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